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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 202

HOWETH M. MILLS AND CRAWFORD MILLS, d/b/a MILLS DAIRY PRODUCTS COMPANY, A CO-PARTNERSHIP, BRICE G. TWILLEY, INDIVIDUALLY AND BRICE G. TWILLEY, d/b/a TWILLEY'S CITY DAIRY, AND NESBIT C. MURPHY, INDIVIDUALLY AND NESBIT C. MURPHY, d/b/a SHILOH DAIRY FARMS,

Petitioners,

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE, AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The Daily Record Co., Baltimore 3, Md.

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IN THE

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OCTOBER TERM, 1962

No. ------

HOWETH M. MILLS AND CRAWFORD MILLS, d/b/a MILLS DAIRY PRODUCTS COMPANY, A CO-PARTNERSHIP, BRICE G. TWILLEY, INDIVIDUALLY AND BRICE G. TWILLEY, d/b/a TWILLEY'S CITY DAIRY, AND NESBIT C. MURPHY, INDIVIDUALLY AND NESBIT C. MURPHY, d/b/a SHILOH DAIRY FARMS,

Petitioners,

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE, AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Howeth M. Mills and Crawford Mills, as individuals, and Howeth M. Mills and Crawford Mills, d/b/a Mills Dairy Products Company; Brice G. Twilley, individually, and Brice G. Twilley d/b/a Twilley's City Dairy; and Nesbit C. Murphy, individually, and Nesbit C. Murphy d/b/a Shiloh Dairy Farms, pray that a writ

of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered March 11, 1963.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 315 F. 2d 828 and is printed herein (App. 1a).

The opinions of the District Court are reported at 185 F. Supp. 709 (D. Md.), (Gov't. App. 96); 187 F. Supp. 314 (D. Md.), (Gov't. App. 107) and 206 F. Supp. 239 (D. Md.), (Gov't. App. 205).[1]

JURISDICTION

The judgment of the Court of Appeals was entered March 11, 1963. Jurisdiction arises under 28 U.S.C. 1254. No petition for rehearing was filed by Petitioners herein.[2]

QUESTIONS PRESENTED

1. Whether petitioners were denied due process of law by the refusal of the Secretary of Agriculture to permit them to introduce any evidence at a hearing conducted pursuant to Section 608c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601, *et seq.*

2. Whether the Secretary of Agriculture violated his own regulations (25 F.R. 5911-5917, June 28, 1960; 7 C.F.R.,

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[1] Reference is made to the Government's Appendix in the Court of Appeals as "Gov't. App.". The Appendix of Petitioners herein in the Court of Appeals is referred to as "Mills App.". The appendix hereto is referred to as "App.".

[2] A petition for a stay was filed by petitioners herein and denied by the Court of Appeals on April 25, 1963. A petition for rehearing was filed by oth[illegible] Appellees in the consolidated appeals and was also denied on April 25, 1963. The opinion and order of the Court denying the petition for rehearing and the motion for a stay, not yet officially reported, are printed in App. 20a, 24a.

Ch. IX), issued pursuant to Section 608c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, in refusing petitioners the opportunity to introduce any evidence at a hearing conducted pursuant to Section 608c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601, *et seq.*

3. Whether the the Secretary of Agriculture violated Sections 1004 and 1006 of the Administrative Procedure Act, 5 U.S.C. 1001, *et seq.*, in denying petitioners the opportunity to submit evidence at a hearing conducted pursuant to Section 608c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601, *et seq.*

4. Whether the Secretary of Agriculture, by including the rural and non-contiguous Eastern Shore area of Maryland along with the Baltimore Metropolitan area in Milk Marketing Order No. 127 (24 F.R. 11071) exceeded his authorized statutory power.

5. Whether the Secretary of Agriculture, before issuing Milk Marketing Order No. 127 (now No. 16) (24 F.R. 11071), pursuant to Section 608c(18) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*, was required by that Section to make basic findings of fact.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS

1. Constitution of the United States, Amendment V.

2. Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.* (App. 27a).

3. Sections 1004(b) and 1006(c) of the Administrative Procedure Act of 1946, as amended, 5 U.S.C. 1004(b) and 1006(c) (App. 40a).

4. Rules of Practice Governing Proceedings in Petitions to Modify or to be Exempted From Marketing Orders. 25 F.R. 5911-5917, June 28, 1960; 7 C.F.R., Ch. IX (App. 41a).

5. Milk Marketing Order No. 127, effective January 1, 1960, 24 F.R. 11071, December 31, 1959 (App. 66a).

STATEMENT OF THE CASE

Pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601, *et seq.*, the Secretary of Agriculture issued Milk Marketing Order No. 127 (App. 66a) effective January 1, 1960.[3] Order No. 127 regulated the marketing of milk in Baltimore City, counties contiguous thereto and certain rural and essentially non-contiguous counties located on the "Eastern Shore" of the Chesapeake Bay.[4] The Order was entitled as included in its scope of coverage the "Upper Chesapeake Bay Marketing Area." The Order provided, *inter alia*, for the fixing of minimum prices for milk received from dairy farmers by milk companies engaged in the business of selling fluid milk in the marketing area.[5]

Petitioners are milk companies whose plants are located in Dorchester County on the Eastern Shore. Petitioners acquire their milk almost exclusively from local dairy

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[3] 24 F.R. 11071, December 31, 1959.

[4] The Eastern Shore counties included in the order are Caroline, Cecil, Dorchester, Kent, Queen Annes, Somerset, Talbot, Wicomico and Worcester (App. 69a).

[5] The Agricultural Marketing Agreement Act governs the regulations by the Secretary of Diverse Agricultural Commodities. The Act refers to those who raise or produce the commodities as "producers" and those who distribute the commodities as "handlers". Since the instant petition is concerned solely with the regulation of milk, the producers will be referred to as "dairy farmers" and the handlers referred to as "milk companies".

farmers for processing and resale to customers on the Eastern Shore.

The Secretary of Agriculture has consistently maintained that petitioners are subject to the regulatory provisions of Order No. 127. Upon failure of petitioners to comply with the Order, the United States instituted suit against petitioners to enforce compliance pursuant to provisions of 608(a).[6]

On June 30, 1960, the District Court granted the Government's Motion for Summary Judgment and entered its order directing petitioners to comply, *United States v. Mills, et al.*, 185 F. Supp. 709 (D. Md.) (Gov't. App. 96).

Prior to the enforcement actions, petitioners had filed a petition with the Secretary of Agriculture pursuant to Section 608c(15)(A) asserting, *inter alia*, that Order No. 127 would cause petitioners "irreparable injury" and for this and other reasons Order No. 127 was not in accordance with law.[7]

Petitioners also asserted that they as well as the entire Eastern Shore area should be exempted from the Order, (Gov't. App. 134, 136) and that the Order should be modified accordingly.

The (15)(A) hearing "commenced as scheduled" on August 3, 1960. At the hearing, all proffered evidence "outside the record upon which the order was issued" was excluded[8] (Gov't. App. 121). On June 14, 1961, the exclusionary rulings of the Hearing Examiner were affirmed by the Judicial Officer (Gov't. App. 119-122), the relief re-

[6] *United States v. Mills, et al.*, No. 8774 (Gov't. App. 81).

[7] In re, Mills Dairy Products Company, et al, AMA Docket No. 127—1, June 14, 1961 (Gov't. App. 119).

[8] Mills App. 38-42, 66, 68, 73-81, treated more fully infra at p. 7 of this Petition.

quested by petitioners was denied and their (15)(A) petition was dismissed (Gov't. App. 147-149, 149-176).

Petitioners thereupon sought review of the Secretary's rulings in the District Court, pursuant to 7 U.S.C. 608c(15)(B).

The District Court on June 13, 1962, found Order No. 127 invalid, *Mills, et al. v. Freeman, Secretary of Agriculture*, 206 F. Supp. 239 (Gov't. App. 205). From this decision relieving petitioners from further compliance with the Order, the United States and the Secretary appealed. The Court of Appeals on March 11, 1963, reversed and remanded the proceedings to the District Court for enforcement.

Thereafter, a petition by another appellee in the consolidated appeals and a motion for stay pending certiorari by petitioners herein were denied (App. 24a).

REASONS FOR ALLOWANCE OF THE WRIT

I.

PETITIONERS WERE DENIED DUE PROCESS OF LAW BY THE HEARING OFFICER'S RULING THAT NO EVIDENCE MAY BE ADMITTED AT A HEARING HELD PURSUANT TO SECTION 608c(15)(A) OF THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937, AS AMENDED.

The Court of Appeals sustained the refusal of the Hearing Officer of the Department of Agriculture to admit any evidence offered by petitioners at the hearing conducted pursuant to Section 608c(15)(A) of the Agricultural Marketing Act of 1937, 7 U.S.C. 601 *et seq.* The Court of Appeals was of the opinion that it could "perceive no error" in the ruling of the Officer and that "[r]elief may be asked solely on the ground that the Order 'is not in accordance with law'" because "[t]o allow evidence would be to reopen, rather than to judge, the promulgation proceeding." (App. 14a).

The decision of the Court of Appeals was in error because the rulings of the Hearing Officer were (1) in violation of the Due Process clause of the Fifth Amendment; (2) contrary to the provisions of Section 608c(15)(A) of the Act, and the published procedural rules of the Secretary of Agriculture (25 F.R. 5911-5917; 7 C.F.R. Ch. IX) issued pursuant to the Act; and (3) in derogation of The Administrative Procedure Act of 1946, 5 U.S.C. 1001, *et seq.*

The proceedings under 7 U.S.C. 608c(15)(A).

At the outset of the Section (15)(A) hearing before the Hearing Officer of the Department of Agriculture, witnesses were called by counsel for petitioners for the purpose of submitting evidence by way of testimony and documents. Counsel for the Secretary of Agriculture immediately made a blanket objection to the admission of any testimony at the hearing on the ground that the evidence would be "*de novo*." The objection was sustained by the Hearing Officer (Mills App. 38). The Hearing Officer stated that: "* * * my rulings will be uniformly sustaining any objections to bring in *de novo* evidence or supplementary evidence, explanatory evidence as to what was contained in that record" (Mills App. 39). The Hearing Officer further ruled that, "it doesn't make any difference if it wasn't brought out." in the promulgation hearing (Mills App. 39): "I feel that the precedents establish the basic law and it is contrary to *de novo* evidence going into this record * * *" (Mills App. 41).

The Hearing Officer was of the opinion that he was:

> * * * pretty much in the same position a federal judge would be in a (15)(A) review. (7 U.S.C. 608c(15)(A)). He would be completely restricted to the record made down below, and no one would be permitted to introduce any additional evidence before that

> court, but that doesn't mean that you are deprived of a hearing. You will get the hearing that the law affords you and that's all (Mills App. 41).

The Hearing Officer did permit counsel for petitioners to make offers of proof but stated these were not evidence and could not be considered in the administrative proceeding. To the offers, the Hearing Officer said: "My ruling is that an offer of proof as evidence cannot be considered at a later time unless there is an appeal" (Mills App. 67). As to such offers of proof, he later said: "It is not considered evidence involved in this proceeding here" (Mills App. 67).

Counsel for petitioners objected to this ruling as:

> It seems to me, sir, you have got us completely boxed in on what we thought was going to be a "hearing" under the Act. Now, sir you have ruled at the moment that we cannot put in evidence. Is a hearing merely for us to appear before you and argue these principles, to write them on a piece of paper and give them to you as a brief? If you have got us boxed in in all directions so we can't produce evidence, then it isn't a hearing. It becomes nothing more than an argument (Mills App. 78).

To this the Hearing Officer replied: "It is the same as though you had a motion on the pleadings before a court of law. You would have a ruling on that motion but you would not be permitted to put in any evidence * * *" (Mills App. 78). The Hearing Officer reiterated that a (15)(A) hearing was comparable to a review by a Circuit Court of Appeals and accordingly, no evidence might be offered to show that the Eastern Shore should be excluded from the Order (Mills App. 81). The Hearing Officer's exclusionary ruling was affirmed by the Judicial Officer for the Secretary of Agriculture (Gov't. App. 119-122).

1. THE REFUSAL OF THE HEARING OFFICER TO ADMIT EVIDENCE WAS A DENIAL OF DUE PROCESS; THE HEARING CONFERRED BY 7 U.S.C. 608c(15)(A) INCLUDES THE RIGHT TO BE HEARD AND TO INTRODUCE EVIDENCE.

Title 7, Section 608c(15)(A) provides:

> Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of *any such order* or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. *He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture*, with the approval of the President. *After such hearing*, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law. (Emphasis added.) (App. 38a.)

7 U.S.C. 608c(15)(A)[9] expressly provides that after a handler has filed a petition he "shall thereupon be given *an opportunity for a hearing* upon such petition * * *." (Emphasis added.)

This Court has on many occasions defined the meaning of the word "hearing" as it relates to proceedings before an administrative agency. In *Baltimore & O. R. Co. v. United States*, 264 U.S. 258, 265 (1924), this Court held that, "the provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced, or to make an essential finding without supporting evidence, is arbitrary action." See also: *Skinner & Eddy Corp. v. United States*, 249 U.S. 557 (1919); *Phila-*

[9] Hereafter referred to as "(15)(A)" or "15(A) proceeding".

delphia Co. v. Securities and Exchange Com'n., 175 F. 2d 808 (C.A.D.C., 1948).

Again, in *Shields v. Utah Idaho Central R. Co.*, 305 U.S. 177, 182 (1938), the Court stated that "the requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts'. The 'hearing' is 'the hearing of evidence and argument.'" Citing *Morgan v. United States*, 298 U.S. 468 (1936).

In *United States v. Ruzicka*, 329 U.S. 287 (1946), this Court in considering the various aspects of a (15)(A) proceeding, said such a proceeding gave a "handler an expert forum for contest," (p. 292) and that "the questions (to be decided in such a proceeding) are not, or may not be, abstract questions of law." They are rather "questions of law arising out of, or entwined with factors" (p. 294). cf. *Stark v. Wickard*, 321 U.S. 288 (1944).

The Court of Appeals for the Second Circuit has clearly indicated that evidence is properly admitted in a (15)(A) proceeding and that detailed findings of fact and conclusions are to be made from such evidence. *New York State Guernsey Breeders' Co-Op. v. Wickard*, 141 F. 2d 805 (C.A. 2, 1944) (p. 807).

The essential elements of an administrative hearing must include the right and opportunity to present evidence, to submit rebuttal evidence, and to conduct cross examination, so that there will be a full and complete record of all relevant facts upon which a comprehensive ruling may be made in accordance with the authority of the administrative agency. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U.S. 123 (1951); *Morgan v. United States*, 304 U.S. 1 (1938); *Bowles v. Baer*, 142 F. 2d 787 (C.A. 7, 1944);

cf. *Miami Beach Federal Savings & Loan Ass'n v. Callander*, 256 F. 2d 410 (C.A. 5, 1958); *Green-Spring Dairy, Inc. v. Commissioner of Internal Revenue*, 208 F. 2d 471 (C.A. 4, 1953).

2. THE REFUSAL OF THE PRESIDING OFFICER AFFIRMED BY THE JUDICIAL OFFICER TO ADMIT EVIDENCE WAS CONTRARY TO THE RULES OF THE SECRETARY OF AGRICULTURE.

At the time the proceedings were commenced on Mills' Petition under (15)(A), the Department of Agriculture had published and in effect "Rules of Practice Governing Proceedings on Petitions to Modify or To Be Exempted From Marketing Orders," 25 F.R. 5911-5917, June 28, 1960; 7 C.F.R., Ch. 1X (App. 41a). Those Rules were issued under authority of 7 U.S.C. 608c, and are set forth in sections 900.50 through 900.71.

The Secretary of Agriculture was enjoined by (15)(A) to give a petitioner a hearing, "*in accordance with regulations made by* the Secretary of Agriculture." The quasi-judicial nature of a (15)(A) proceeding is set forth in the Regulations which provide for (1) "Application to dismiss a petition" (App. 44a); (2) the issuance of subpenas (App. 57a); (3) the examination of witnesses and the receipt of evidence (App. 48a); (4) the taking of depositions (App. 48a); (5) the admission and exclusion of evidence (App. 48a); (6) oral argument on facts or law (App. 48a); (7) reporting of testimony verbatim (App. 51a); (8) the testimony of witnesses be under oath or affirmation (App. 47a); (9) depositions (App. 52a); (10) exhibits in the form of statements, charts, tabulations, or similar data, "Offered in evidence" (App. 53a); (11) a provision for review by the Secretary of Agriculture "upon the basis of the record" (App. 61a); (12) the issuance of an order and finally a

rule allowing "applications for reopening hearing," to take further evidence (App. 62a).

Petitioners were not granted a "hearing", "in accordance with regulations." Accordingly, the hearing requirement by (15)(A) was violated by the Hearing Officer. That violation was condoned by the Court of Appeals when it upheld the ruling of the Hearing Officer which excluded all evidence offered by petitioners in the (15)(A) proceeding.

This Court has consistently held that an administrative agency is bound to follow its own rules and regulations promulgated pursuant to Congressional authority. *United States v. Shaughnessy*, 336 U.S. 806 (1949). Even if there could be doubt as to the meaning of the term "hearing" contained in 608c(15)(A), it should be construed in the constitutional sense and compatible with due process where such a construction is possible. No doubt that construction is at least possible here. *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); *Philadelphia Co. v. Securities and Exch. Com'n.*, 175 F. 2d 808, 817 (C.A.D.C., 1948).

3. The Refusal of the Hearing Officer, as Affirmed by the Judicial Officer, to Afford Petitioners an Opportunity to Present Evidence at the (15)(A) Hearing Violated the Administrative Procedure Act of 1946.

The Administrative Procedure Act of 1946, 5 U.S.C. 1001 *et seq.* provides in pertinent part in Section 1004 that:

> In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * * (with inapplicable exceptions).
>
> * * * * * *
>
> (b) The Agency shall afford all interested parties opportunity for (1) the submission and consideration of

> facts, arguments * * * where time, the nature of the proceeding, and the public interest permit * * * (App. 40a).

Section 1006(c) of Title 5 provides in part:

> Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts (App. 40a, 41a).

Since Congress did not define precisely the character of the hearing to be afforded by the Secretary in a (15)(A) proceeding, it is submitted that the national policy with respect to full and fair quasi-judicial proceedings by administrative agencies of the Government embodied in the Administrative Procedure Act applied. There is no doubt that the Administrative Procedure Act did not permit the Hearing Officer to refuse to accept evidence proffered on behalf of the petitioners on the ground that they were limited by the record in the promulgation hearing. *Marine Engineers Ben. Ass'n. v. National Labor Rel. Bd.*, 202 F. 2d 546 (C.A. 3, 1953); *Brotherhood of R.R. Trainmen v. Swan*, 214 F. 2d 56, 59 (C.A. 7, 1954); *Pinkett v. United States*, 105 F. Supp. 56 (D.C. Md.); *National Labor Rel. Bd. v. Houston & North Tex. M.F.L.*, 193 F. 2d 394 (C.A. 5, 1951).

II.

THE INCLUSION BY THE SECRETARY OF THE EASTERN SHORE COUNTIES IN ORDER NO. 127 IS ARBITRARY, CAPRICIOUS AND NOT IN ACCORDANCE WITH LAW.

In promulgating the Washington Milk Marketing Order which became effective on May 29, 1959, (24 F.R. 4331) the Deputy Administrator in his revised recommended decision issued on January 30, 1959 (24 F.R. 767, 769), found as an ultimate fact that the Eastern Shore Counties should be excluded from that order because

> While one substantial Washington handler (National Dairy Products) distributes milk through an independent vendor in the Eastern Shore Counties of *Dorchester, Somerset, Talbot, Wicomico, Worcester, Accomack* and Northampton, this area is basically rural in character and its inclusion in the area would bring under regulation a number of distributors doing a large portion of their business in other parts of Maryland and the State of Delaware where Washington area handlers have little or no distribution. *This distribution by the Washington handler constitutes a minor portion of his overall fluid business.* It is neither administratively feasible nor necessary to include within the marketing area all the territories in which Washington handlers do any business. Ideally, the established marketing area boundaries should encompass that area in which handlers who would be regulated do the preponderance of their business and should leave a minimum of competition with unregulated handlers outside of the area. The inclusion of any part of the Eastern Shore area would not tend to implement this position, but would place local handlers servicing this area in a disadvantageous position relative to their competition in their *normal area of distribution outside of the marketing area.* (Emphasis added) (Gov't. App. p. 213).

Until the day before the date of the recommended decision, all sales of milk by National Dairy Products to the Eastern Shore had been made from its Sealtest Washington plant and no sales to the Eastern Shore had been made by Sealtest Baltimore plant. On January 29, 1959, National Dairy Products transferred its source of supply to Clark Brothers (the Eastern Shore distributor for National Dairy) from the Sealtest Washington plant to the Sealtest Baltimore plant (Mills App. 15-17). A Sealtest witness frankly indicated that the switch from Washington to Baltimore was made because the recommended decision for the

Washington Metropolitan area excluded the Eastern Shore as a part thereof and Sealtest wanted the Eastern Shore to be regulated [in the Baltimore order] (Mills App. 18, 29).

The basic justification for the determination by the Secretary to include the Eastern Shore within the Baltimore marketing area was because Sealtest had transferred its supply of milk to Clark Brothers from Washington to Baltimore (Mills App. 14, 15, 29, Gov't. App. 11).

It is apparent that National Dairy Products by its own deliberate unilateral action was permitted to create an artificial condition for the express purpose of forcing the Secretary to include the Eastern Shore counties within the scope of the order which was directed primarily at marketing conditions in the Baltimore Marketing area. As a consequence it was National Dairy Products — not the Secretary — which determined that handlers and farmers on the Eastern Shore should be included in the Order. This seems intolerable in view of the tragic consequences to Petitioners and other Eastern Shore handlers and their producer-farmers.

The District Court found:

> In fact, the inclusion of the rural counties in the marketing area gives the Baltimore City dealers, with their large plants and facilities for disposing of Class II milk, a considerable competitive advantage over the local dairies. The Order makes it economically impossible for the county dairies to continue to pay their efficient farmers a higher price than the pool price, and thus takes away from the small county dairies the only effective weapon they had to compete with the Goliaths of the industry (Gov't. App. 215).

> Naturally the large city handlers and the Cooperative, which desired and needed a pool for the City market, wanted the Secretary to include the county dairies in the pool, because as a result of the greater Class I use by the county dairies they were bound to contribute more than they took out, and would to that extent subsidize the city handlers (Gov't. App. 232).

In his consideration of the area to be included in the Marketing Area Order, the Secretary should have disregarded National Dairy Products' fraudulent action and in that event there would have been no valid basis for the inclusion in the marketing area of the Eastern Shore. The Order purported to correct an assumed disorderly market in the Baltimore metropolitan area which stemmed from an alleged surplus of milk in that market. The Secretary was dealing with a distinctly Baltimore area problem and the basic purpose of the Order was to meet that metropolitan problem. Eastern Shore handlers did not, and could not, contribute to that surplus because Eastern Shore handlers were not permitted by a Baltimore City ordinance to sell milk in Baltimore and Eastern Shore farmer-producers, in fact, sold a miniscule amount of milk to Baltimore City handlers (Mills App. 5, 6, 7, 8, 9, 23; Gov't. App. 212, 232).

Of all the Baltimore City handlers, only two shipped to the Eastern Shore: National Dairy Products (Sealtest), after its switch, and H. E. Koontz Creamery, Inc.[9a] (Mills App. 12). All Baltimore City handlers marketed 95% of their milk in Baltimore City and "nearby counties", and this area does not include the Eastern Shore (Gov't. App.

[9a] The sales of milk on the Eastern Shore by Aristocrat Dairy were in such small volume that they could not be used as even a basis for consideration in establishing this area as a part of the marketing area (Mills App. 14; Gov't. App. 213).

213; Mills App. 17, 86-88), so it would appear that this rural area, comparatively distant from Baltimore, was included solely for the benefit of these large two dairies, one of which had deliberately created the condition of which it then complained.

As a consequence the Order, by including the Eastern Shore, compels Eastern Shore handlers and farmers to be subject to drastic price regulation and to contribute financially to the solution of the Baltimore City marketing problem in which they had no part in creating and in which they have no interest.

The findings made in promulgating the Washington milk market order apply with equal force and logic to Order No. 127. The definition of the standard that "the established marketing area boundaries should encompass that area in which handlers who would be regulated do the preponderance of their business" would necessarily exclude the Eastern Shore Counties from Order No. 127 because the Baltimore handlers do the preponderance of their business, approximately 95%, in the Baltimore Metropolitan area (Mills App. 86, 88). The finding made in the Washington order, that only "one substantial Washington handler distributed milk through an independent vendor in the Eastern Shore Counties . . ." is also true here (Mills App. 14).

In summary, there is no substantial evidence in the record to show why these Counties should have been excluded from the Washington Metropolitan marketing area (which is closer to the Eastern Shore area than Baltimore) but should be included in the Baltimore Metropolitan marketing area.

It appears that only 5% of the total sales of milk made by proponents of the order whose dairies were located in Baltimore City finds its way to the Eastern Shore (Gov't.

App. 213),[10] Yet, instead of finding that this was *de minimis*, the Secretary's decision and Order finds that this 5% constitutes a "substantial interest in the entire eight-county area" (Gov't. App. 11). This position is made anomalous a few pages later in the order where the Secretary finds that "any distributing plant which does less than 10% of its total fluid business in the marketing area should not be considered as substantially associated with the local market" (Gov't. App. 15). Under this standard, no Baltimore handler is associated with the Eastern Shore market.

In *United States v. Rock Royal Co-op.*, 306 U.S. 533 (1937) this Court held that the authority of the Secretary to establish a marketing area was limited to a homogeneous city milk shed in the same manner that Congress limited his choice of commodities to be regulated. At page 576, the Court said:

> The Secretary is not permitted freedom of choice as to the commodities which he may attempt to aid by an order. The Act, Section 8c(2) limits him to milk, fresh fruits except apples, tobacco, fresh vegetables, soybeans and naval stores. The Act authorized a marketing agreement and order to be issued for such production or marketing regions or areas as are practicable. *A city milkshed seems homogeneous. This standard of practicality is a limit on the power to issue orders. It determines when an order may be promulgated.* (Emphasis added.)

In *Rock Royal*, the Supreme Court made it clear that the marketing area of an order must be homogeneous and "this standard of practicality is a limit on the power to issue orders" and "it determines when an order may be promulgated."

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[10] Of the ten Baltimore City dealers, only three Baltimore handlers ship to the Eastern Shore: National Dairy Products (Sealtest), H. E. Koontz Creamery Company, and Aristocrat Dairy (Mills App. 12, Gov't. App. 213).

There is no evidence in the record from which a finding could be made that the Eastern Shore is homogeneous, *i.e.*, uniform with the Baltimore Metropolitan area. On the contrary, the economic and geographical facts make clear that the Eastern Shore is not a natural part of the Baltimore milkshed. (See findings of the District Court, Gov't. App. 232-233.)

The inclusion of the Eastern Shore in Order No. 127 was arbitrary and capricious since this determination is inconsistent with the position taken in the promulgation of the Washington Milk Marketing Order. The Order is not in accordance with law since the area included by Order No. 127 exceeds the standard of practicality which governs the issuing of milk marketing orders as determined by this Court. The Secretary's Order, insofar as it applies to the Petitioners, is invalid, and the Court of Appeals erred in not so holding.

The District Court found as a fact that there was no evidence in the record from which a finding could be made that the Eastern Shore is homogeneous; *i.e.*, uniform with the Baltimore Metropolitan area. The District Court further found to the contrary, that the economic and geographic facts make clear that the Shore is not a natural part of the Baltimore milk shed. (Findings of the District Court, Gov't. App. 232-233.)

The Court of Appeals, however, reversed the District Court without taking issue with any of the facts found by that Court, and in disregard of the mandate of *Rock Royal* as to practicality or homogeneity.

The Court of Appeals could not find from the record the threshold jurisdictional basis for the inclusion of the Eastern Shore in the marketing area. It could only find from the record that "[w]hile the appellee dairies (the

petitioners) may not have been effected by the market disturbance described by the Secretary, there is no reason to think that they would not be in the future and that Order 127 did not in some measure prevent the dairies from feeling the disturbance" (App. 13a, 14a).

The Act does not authorize the Secretary to issue orders on the basis of conjecture, speculation and remote possibilities.

III.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE SECRETARY OF AGRICULTURE COMPLIED WITH THE REQUIREMENTS OF SECTION 608c(18) OF THE AGRICULTURAL MARKETING ACT OF 1937, AS AMENDED.

The enabling legislation for the issuance of an order with respect to milk or its products, under Section 608c(18), requires that: "* * *, whenever the Secretary *finds*, upon the basis of the evidence adduced [at the administrative hearing under 608b preliminary to the promulgation of the order] * * *, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supply of feeds, and other economic conditions * * *, he shall fix such prices as he finds will reflect such factors * * * and be in the public interest" (Emphasis added) (App. 39a).

The Order issued by the Secretary contains under the heading, "Findings upon the basis of the hearing record" general conclusionary findings parroting the language of the act.[11] The order contains no basic or ultimate findings of fact to support these general conclusions as required by 608c(18).

The Court of Appeals held the order valid because the Secretary's parroting of the Act had a "firm basis in the

[11] Sec. 1027.0 of Order No. 127, 24 F.R. 11071; Gov't. App. 51-53; App. 66a-68a.

record" (App. 8a). The Court of Appeals erred in sustaining the Secretary since it is evident that the Secretary cannot issue a valid order merely by indiscriminately placing facts and testimony in a voluminous record, which may or may not support his order, and then issuing an order using only the language of the act without indicating in any respect how the record supports the conclusion in the order.

When Congress conferred an explicit Federal right upon a handler to an administrative proceeding under (15)(A), Congress made it clear that it intended that a complaining party would have a real and substantial remedy and the right to be exempted from the order if the Order was not in accordance with law. If the Court of Appeals is correct in holding that the Secretary need not make any findings of fact to support his order, then the right to challenge the validity of the order on the basis of the promulgation record or upon further evidence is so emasculated as to become meaningless, because the reviewing court is denied the opportunity to evaluate the legality of the order upon the facts on which it is purportedly based or upon additional facts which may be brought out at the (15)(A) proceedings. This is apparent since the Court of Appeals also ruled that no evidence may be introduced at a (15)(A) proceeding. Thus, if the Court of Appeals is correct, a handler is completely without a remedy even if the order is patently arbitrary and capricious.

In *Phillips Dodge Corp. v. National Labor Rel. Bd.*, 313 U.S. 177, 197 (1941), this Court speaking through Mr. Justice Frankfurter said:

> The administrative process will best be vindicated by clarity in its exercise * * * it will avoid needless litigation and make for effective and expeditious enforce-

> ment of the Board's order to require the Board to disclose the basis of its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it.

See *United States v. Baltimore & O. R. Co.*, 293 U.S. 454 (1935); *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U.S. 499, 511 (1935); *Heitmeyer v. Federal Communications Commission*, U.S. F. 2d 91 (C.A.D.C. 1937); *American Airlines v. Civil Aeronautics Board*, 235 F. 2d 845 (C.A.D.C., 1956).

Because the Secretary's Order contains no findings to support his ultimate conclusion but merely paraphrases the Act, the Order is fatally defective.

CONCLUSION

Whether the quasi-judicial hearing authorized by Section 608c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, must be deemed a hearing with the attributes of due process involves an important constitutional question. The decision below to the contrary seems in conflict with prior decisions of this Court interpreting other statutes conferring a federal right to a "hearing". Furthermore, the decision of the Fourth Circuit is in conflict with the decision of the Second Circuit in *New York State Guernsey Breeders' Co-op. v. Wickard*, supra.

This petition presents important and substantial questions of Federal Law, namely (1) whether the Secretary of Agriculture violated his own regulations in denying Petitioners an opportunity to introduce evidence at a (15)(A) hearing, (2) whether such denial violated the Administrative Procedure Act, (3) whether the Secre-

tary, by including the non-contiguous Eastern Shore area of Maryland in the Baltimore Metropolitan area in Marketing Order No. 127, exceeded his authorized statutory power, and (4) whether the Secretary, before issuing such order, was required by the statute to make basic findings of fact.

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BEN IVAN MELNICOFF.

June, 1963.

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
(Filed March 11, 1963)

No. 8774

United States of America,
Appellant,

versus

Howeth M. Mills and Crawford Mills, as individuals, and Howeth M. Mills and Crawford Mills, d b a Mills Dairy Products Company, a co-partnership,
Appellees.

No. 8775

United States of America,
Appellant,

versus

Willow Farms Dairy, Inc.,
Appellee.

No. 8776

United States of America,
Appellant,

versus

Brice G. Twilley, individually, and Brice G. Twilley, d b a Twilley's City Dairy,
Appellee.

No. 8777

United States of America,

Appellant,

versus

Nesbit C. Murphy, individually, and Nesbit C. Murphy, d/b/a Shiloh Dairy Farms,

Appellee.

No. 8778

Howeth M. Mills and Crawford Mills, individually and as co-partners, d/b/a Mills Dairy Products Company, a co-partnership, Nesbit C. Murphy, an individual, d/b/a Shiloh Dairy Farms, and Brice G. Twilley, an individual d/b/a Twilley's City Dairy,

Appellees,

versus

Orville L. Freeman, Secretary of Agriculture,

Appellant.

No. 8779

Willow Farms Dairy, Inc., and Kenneth Barrick, et al., intervening plaintiffs,

Appellees,

versus

Orville L. Freeman, Secretary of Agriculture,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Roszel C. Thomsen, District Judge.

No. 8849

United States of America,
Appellant and Cross-Appellee,

versus

Royal Farms Dairy, Inc.; Wilton Farm Dairy, Inc.; and W. S. Hebb and Lorraine D. Hebb, co-partners, d/b/a Aristocrat Dairy,
Appellees and Cross-Appellants.

Cross-Appeals from the United States District Court for the District of Maryland, at Baltimore. Roszel C. Thomsen, District Judge.

(Argued January 10, 1963. Decided March 11, 1963.)

Before Sobeloff, Chief Judge, and Bryan, Circuit Judge.

Richard S. Salzman, Attorney, Department of Justice, (Joseph D. Guilfoyle, Acting Assistant Attorney General; Joseph D. Tydings, United States Attorney; Alan S. Rosenthal, Attorney, Department of Justice; Neil Brooks, Assistant General Counsel, and J. Charles Krause, Joseph A. Wash, Attorneys, Department of Agriculture, on brief) for Appellants in Nos. 8774 to 8779, both inclusive; Charles G. Page (White, Page & Lentz on brief) for Appellees in Nos. 8775 and 8779; Robert F. Skutch, Jr., and Ben Ivan Melnicoff (Weinberg & Green on brief) for Appellees in Nos. 8774, 8776, 8777 and 8778. No briefs filed nor oral argument in No. 8849.

ALBERT V. BRYAN, Circuit Judge:

A Federal Milk Marketing Order for the Upper Chesapeake Bay area, including Baltimore, was struck down by the District Court at the suit of four dairies located

within this part of Maryland but outside the City. The United States appeals, contesting the fatal infirmities found by the Court in the Order. The suit, we think, should not have succeeded.

The Order in question, designated as No. 127, was issued under the Agricultural Marketing Agreement Act of 1937 (reenacting and amending the Agricultural Adjustment Act, 1935) as amended, 7 U.S.C. §601 et seq.* It regulated the marketing of milk in Baltimore, in all the counties on the Eastern Shore and in several on the west of Chesapeake Bay adjacent to Baltimore. Pursuant to the Act the Order fixed minimum prices to the farmers — known as producers—for milk purchased from them by dairies—known as handlers—selling fluid milk in the marketing area. The necessity of milk regulation, as well as the modus operandi of a Milk Order, has been fully explained in United States v. Rock Royal Co-op., 307 U.S. 533, 542-550, 571 (1939) and, as its general structure and operation are not now in controversy, no further exposition is requisite. Likewise the interstate nature of the milk operations here is not questioned.

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* The issue of the validity of the Order is here in seven appeals. In Nos. 8774, 8775, 8776 and 8777, the United States obtained decrees under § 608a(6) of the Act enforcing the Order against Mills Dairy, Willow Farms Dairy, City Dairy and Shiloh Dairy. Subsequently in a joint suit, No. 8778, Mills, City and Shiloh, and in a separate suit, No. 8779, Willow Farms, by way of a review of the Order under § 608c(15)(B) obtained the decrees invalidating it. Thereupon the Court suspended the enforcement decrees. In these six cases the United States appeals to set aside the invalidation decree. In addition, there is an appeal by the United States, No. 8849, involving a joint decree of enforcement against Royal Farm Dairy, Wilton Farm Dairy and Aristocrat Dairy, which the Court later set aside but required compliance with the Milk Order for several months. The United States there too seeks to set aside the vacation of the Order; the dairies appeal against the compliance decreed for these months.

The opinion will consider the validity of the Milk Order as the common question in all of these appeals. Inasmuch as this determination will be decisive of all the appeals, no separate consideration need be given each decree.

The Act seeks "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices . . ." §602(1). For definition of "parity prices" it refers to the Agricultural Adjustment Act, 7 U.S.C. §1301(a), prescribing an arithmetical method of their computation. Generally, it is the price which would give farm commodities the purchasing power approximating what they possessed from 1910 to 1914, the years just before World War I. This aim of the statute is to be achieved through "the exercise of the powers conferred upon the Secretary of Agriculture" by the Act, which also made stipulations for the protection of the consumer. The instrument afforded the Secretary to accomplish the purpose was an agreement with the farmers and handlers of a selected area or, failing agreement then an order of the Secretary, establishing in the area minimum prices for sales by producer to handler.

In the present case no agreement was obtained and the Secretary promulgated the price order before us. Effective January 1, 1960, it was based upon conditions canvassed in August 1959. It classified milk, as required by the statute, according to the form or purpose for which it was to be used: Class I covering milk sold for fluid use and Class II for that to be manufactured into other dairy products. §608c(5). The minimum prices fixed per hundredweight were: $5.10 for Class I in the months of March through June, and $5.55 from July through February, and a lower figure set for Class II according to a stated formula.

Vitiation of Order 127 was placed by the District Court upon the following premises:

(1) That the Secretary in establishing the Order failed to "find", but merely "ascertained", the parity price of milk — and even then the national, not the local figure — and failed to show the process of the adjustment of it to the minimum prices fixed by the Order;

(2) That the referendum among the producers required by the Act upon the question of whether an Order should

be promulgated was illegal because the Secretary unduly restricted the eligibility of the voters; and

(3) That the marketing area fixed by the Order embraces rural counties along with the City to the detriment of the county handlers.

I. Before issuing an order in respect to milk or its products, the Act demands that the Secretary "ascertain the parity prices of such commodities". It then declares that the parity prices called for in the Act's recital of Congressional purpose, noted *ante*, shall "be adjusted to reflect the price of feeds, the available supply of feeds and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated . . . order . . . relates". Further, if "the Secretary finds, upon the basis of the evidence adduced [at the administrative hearing preliminary to the promulgation of the order] . . . that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supply of feeds, and other economic conditions . . . , he shall fix such prices as he finds will reflect such factors . . . and be in the public interest". §608c(18).

No evidence, concededly, was taken by the Secretary in the administrative proceedings relating to the parity price and on that point he made no "finding". But he did "ascertain" the parity price: $4.93 for August and the remainder of 1959 except $4.91 in October. This was done by calculation under the formula set forth in the Agricultural Adjustment Act, 7 U.S.C. §1301(a)(1) to which, as already mentioned, the Marketing Act refers for definition of parity price. In this reckoning he had access to "Agricultural Prices", an official monthly publication of the Department of Agriculture giving parity prices, average prices paid for feeds and other economic factors. The bulletin apparently is generally known by farmers and dairymen.

Entire compliance with the Act, we think, appears of record in this case. After stating the formula, §1301(a)(1) continues:

"(D) The prices and indices provided for herein, and the date used in computing them, shall be determined by the Secretary, whose determination shall be final."

Following is §1301(c):

"The latest available statistics of the Federal Government shall be used by the Secretary in making the determinations required to be made by the Secretary under this chapter."

"Parity price" is thus an official Government figure and the Secretary is commanded to adopt it. In this view, no evidence was appropriate in its determination. In the absence of some indication that the parity intended by the Act was a local price, we have no reason to think so. This is confirmed by such legislative history as we find on §608c(18), *supra* — the section requiring the ascertainment of parity price — which was brought into the Act by amendment in 1937. The House Report thereon reads:

". . . The proposed amendment recognizes this, and provides that if the Secretary finds that the *national* parity price for milk does not adequately reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area to which the marketing agreement or order relates, he shall fix such prices as will reflect such factors, insure a sufficient quantity of pure wholesome milk, and be in the public interest." [Accent added.] H.R. Rep. No. 468, 75th Cong., 1st Sess. (1937).

The Senate Report rather joins the House Report in the thought that local situations were to be satisfied by trimming or increasing the parity prices through consideration of local conditions. This strongly implies that the parity price to begin with is the national figure. S. Rep. No. 565, 75th Cong., 1st Sess. (1937).

But parity price, whether national or local, is only the starting point of a progression to minimum prices, merely

a referable figure and in no sense final. Although, as heretofore noticed, the policy statement in the Act: §602(1), adverts to "parity prices" as the desideratum which the Act seeks to establish and maintain for farmers, §608c(18) clearly demonstrates that the ultimate object of the legislation is to set reasonable prices. The parity price is a consideration but, whatever the figure, it must be adjusted in the light of the price of feeds and the other factors just quoted from §608c(18). Reasonable price, not parity price, is what the Secretary must "find".

He has done this in §1027.0(a)(2) of the Order:

> "The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the said marketing area, and the minimum prices specified in the order are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk and be in the public interest;"

True, this is a paraphrase of §608c(18), but it has firm basis in the record. In arriving at this determination, the Secretary had before him in the promulgation hearing evidence of the cost of feed, wage rates, demand and deliveries of milk, both nationally and in Maryland, as well as comparisons of related items in adjacent regulated areas, all covering an expanse of several years. In his decision the Secretary looks for "adequate but not excessive supplies" of milk. At considerable length he discusses relevant conditions in the Washington, D.C., Philadelphia and New York-New Jersey markets, concluding the section of his decision on prices with a clear indication that he had in mind "cost factors affecting the supply and demand for milk".

Therefore, it cannot be justly said that the Secretary's finding of parity price or of adjusted or reasonable price was procedurally faulty and not resting on substantial evidence.

II. The point next made to invalidate the Order relates to the requirements of electors in the referendum on the adoption of the Order. The District Court agreed with the appellee dairies that the eligibility rules imposed by the Secretary were illegal in not permitting *all* producers to vote.

Before a Milk Order may be issued the Secretary must, under the Act, give due notice of a hearing upon the proposed Order. At such hearing — known as the promulgation hearing — evidence may be introduced in respect to the need for the order. §608c(3). If then the Secretary finds that the issuance of an order "will tend to effectuate the declared policy" of the Act, he shall issue it. §608c(4). But when, as here, the handlers have failed to agree to it, no order can become effective unless and until the Secretary determines that the failure would tend to prevent attainment of the declared policy of the Act, that the order is the only practical way of advancing the interest of the producers, and that the order is approved:

> "(i) By at least two-thirds of the producers . . . who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or
>
> "(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order." §608c(9)(B)

For the purpose of the referendum producer was defined in the Order in this way:

> "(e) 'Producer' means any dairy farmer, except . . . a dairy farmer for other markets, who produces milk, which is received at a pool plant or is diverted to a nonpool plant during any month(s) of March through August or on not more than 8 days (4 days in the case of every-other-day delivery) during any month(s) of September through February: *Provided*, That the milk so diverted shall be deemed to have been received by the diverting handler at a pool plant at the location from which it was diverted"; §1027.2(e),

and "who, during the representative period [August 1959], were engaged in the production of milk for sale within the aforesaid marketing area." Obviously the qualifications set forth in the Order do narrow the reference in the statute to those persons who must approve the order — the "producers". But the statute itself contains no definition of "producer". Therefore, we think the Secretary had the right to define "producer", and to fit the qualifications of the producer-voter, according to the proposition on referendum. H. P. Hood & Sons v. United States, 307 U.S. 588, 597-98 (1939); United States v. Wrightwood Dairy Co., 127 F. 2d 907, 911 (7 Cir. 1942).

The Order in question dealt only with fluid milk received at, or diverted from, a pool plant as such a plant was described in the Order. All producers making such deliveries were made eligible to vote. True, the definition in the Order did by its terms exclude some farmers who produced milk for sale generally in the respective periods and in the marketing area, and so literally were within the statutory provision for a referendum. But those producers who did not deliver to pool plants in the area were not directly touched by the Order, and hence were not deprived of a substantial right by the Secretary's definition of a voter. The tally was 1663 in favor of the Order, 192 against. No rejection of even one proffered ballot has been shown. In sum, we think the Secretary did not misconstrue the Act.

The creation of a marketing area, it cannot be overstressed, does not inhibit a producer located within the area from selling his milk elsewhere. He need not associate himself with the geographical market of his residence or dairy. The Order rules him only if and when he participates in the local market.

III. Inclusion with the City of Baltimore of counties outside of its limits in constituting the marketing area of the Order is attacked by the appellee dairies — all located beyond the city limits — as unwarranted and prejudicial. Their argument is that they are not a part of the Baltimore community, that they had no milk problem, that it existed alone in the City of Baltimore and that the only farmers and handlers involved in the problem were those serving Baltimore. With this position we cannot agree.

The *problem* in milk marketing is clearly stated in United States v. Rock Royal Co-op., *supra*, 307 U.S. 533, 549-50:

> "The problems concerned with the maintenance and distribution of an adequate supply of milk in metropolitan centers are well understood by producers and handlers. . . . It is generally recognized that the chief cause of fluctuating prices and supplies is the existence of a normal surplus which is necessary to furnish an adequate amount for peak periods of consumption. This results in an excess of production during the troughs of demand. As milk is highly perishable, a fertile field for the growth of bacteria, and yet an essential item of diet, it is most desirable to have an adequate production under close sanitary supervision to meet the constantly varying needs. . . . Since all milk produced cannot find a ready market as fluid milk in flush periods, the surplus must move into cream, butter, cheese, milk powder and other more or less nonperishable products. Since these manufactures are in competition with all similar dairy products, the prices for the milk absorbed into manufacturing processes must necessarily meet the competition of low-cost production areas far removed from the metropolitan

centers. The market for fluid milk for use as a food beverage is the most profitable to the producer. Consequently, all producers strive for the fluid milk market. . . ."

Without regulation in a metropolitan center experience showed that the competition to sell milk for fluid use became so intense that it led to violence as well as economic distress to the farmers with dangerous disruption of the marketing of milk. Nebbia v. New York, 291 U.S. 502, 516-518 (1934).

In the present case, after deciding as a result of the promulgation hearing that a Milk Order was necessary in and around Baltimore, the Secretary laid out the Upper Chesapeake Bay Marketing Area and embraced in it not only Baltimore but nine counties on the Eastern Shore — that is, on the far side of Chesapeake Bay from Baltimore — five entire counties on the Western Shore adjacent to Baltimore, and portions of two others. In sketching these boundaries the Secretary obviously concluded that the area met the approved test: it was a practical homogenous territory of control, fairly encompassing the Baltimore milkshed. *Cf.* United States v. Rock Royal Co-op., *supra*, 307 U.S. 533, 576. This conclusion we think has not been proved wrong.

Fighting the placement of counties with Baltimore, the appellee dairies first point out that they do not, and by virtue of a city ordinance they cannot, sell milk in Baltimore, and so should not be tied into its market. The validity of such a municipal law is questionable. Dean Milk Co. v. Madison, 340 U.S. 349 (1951); Supplee-Willis-Jones Milk Co. v. Huntington Williams, decided July 9, 1956 by the Baltimore City Circuit Court. Actually, however, it does not appear that these county dairies ever tried to enter Baltimore or, indeed, wished to do so.

That milk-wise the City and the counties have a community interest has been clearly established. In 1959 in excess of 50% of the fluid milk dispensed on the Eastern Shore came from the City dairies. A subsequent investi-

gation in 1961 showed that almost 80% of the total distribution on the Eastern Shore was furnished from Baltimore. Furthermore, a major part of the milk sold by producers on the Eastern Shore for fluid use was purchased by the Baltimore companies. As to the Western Shore counties, the Secretary found that there the greater part of the fluid milk commerce was carried on by the Baltimore handlers. Combination of counties with a metropolitan city is not irregular. The Milk Order considered in United States v. Rock Royal Co-op., *supra*, 307 U.S. 533 brought together New York City and three nearby counties.

Again, the entire marketing area delineated by Order 127 is largely constituted of producers having a common interest. They are present throughout the territory. The bond is evidence by their organization into the Maryland Co-operative Milk Producers Association, Inc. (Co-op). It has a membership of 1800 farmers and sells about 75% of all the milk sold in Baltimore.

The assertion by the appellee dairies that they have no problem and should not, therefore, be covered by the Order, is not altogether correct in premise or sound in conclusion. The record shows that the Co-op initiated the movement that culminated in the Order. It shows, too, that producers in the area, including the Co-op, had endeavored to market their milk without the aid of an order. The Secretary has found that this endeavor was not a success. Although the Co-op had sought to maintain fair prices to the farmers through agreements with handlers, this had failed and the stability of the milk market was seriously threatened. The Secretary's decision states, after exploring and expounding the cause of the disruption, that:

> "It is concluded that the issuance of a marketing agreement and order for the Upper Chesapeake Bay marketing area is necessary to re-establish market stability and assure a continuing adequate supply of pure and wholesome milk for the market. . . ."

While the appellee dairies may not have been affected by the market disturbance described by the Secretary, there

is no reason to think they would not be in the future and that Order 127 did not in some measure prevent the dairies from feeling the disturbance. This is true because undoubtedly all the area milk prices had in the past been reflective of the Co-op price; they had been geared to Co-op's. In any event, the Secretary had to view the situation as a whole and deal with it as an entirety. In the circumstances we are not willing to say that the Secretary was clearly mistaken in his determination that appellees' marketing operations ought to be included with those handlers and producers contributing to the Baltimore market supply.

IV. Attacks on the Order other than those just discussed as urged before the District Court, are made in this appeal by the appellee dairies and their intervening farmer-producers. The first is that the Examiner, with the subsequent approval of the Judicial Officer, refused to admit evidence offered by the dairies in the administrative proceeding on their petition was under §608c(15)(A), seeking rescission of the Order by the Secretary. In this ruling we perceive no error.

This section of the Act contemplates a review of the correctness of the Order in law. It does not afford a de novo trial. Relief may be asked solely on the ground that the Order "is not in accordance with law". Obviously, such a review is based upon the record made and concluded in promulgation of the Order. No additional proof is permissible; the Order must stand or fall upon the proof and findings there. Beatrice Creamery Co. v. Anderson, 75 F. Supp. 363, 367 (D. Kan. 1947). See Ogden Dairy Co. v. Wickard, 157 F. 2d 445, 447 (7 Cir. 1946), *cert. denied*, 330 U.S. 827 (1947); Bailey Farm Dairy Co. v. Jones, 61 F. Supp. 209, 217 (E.D. Mo. 1945), *aff'd* 154 F. 2d 87 (8 Cir.), *cert. denied*, 329 U.S. 788 (1946); Queensboro Farm Prod., Inc v. Wickard, 47 F. Supp. 206, 210 (E.D.N.Y. 1942), *aff'd.*, 137 F. 2d 969 (2 Cir. 1943). To allow evidence would be to reopen, rather than to judge, the promulgation proceeding.

Another attack is directed at the status given by the Order to Co-op and to H. E. Koontz Creamery, Inc. (Koontz) in respect to its manufacturing and supply plant located in Westminster, Maryland. Koontz is also a Baltimore handler by the grievance; and our discussion here is confined to its Westminster plant, some 30 miles from the city. Both Co-op and Koontz are classified as pool plant handlers — as explained presently — and this, say the dairies, unfairly confers upon them the protection given handlers by the Order when the Co-op is in actuality a producer only and Koontz a manufacturer of Class II milk rather than a bottler. This plaint involves the whole design of milk-marketing regulation.

In effectuation of the policy of the Act, under the Order the Secretary fixes minimum prices to be paid the farmers for their milk according to the use to which it is devoted, that is: Class I for fluid use and Class II for manufacture, as we have already outlined. Thereafter the proceeds of the sales of both classes are ordered pooled, and that total then divided by the quantity of all milk sold. The result is to give an average, between the Class I and the lower Class II price, known as the "blend" price. This is the price to be paid each farmer for his milk regardless of the use to which it has been put.

To operate this plan, the Order establishes pool plants. These are simply the plants of the handlers regulated by the plan. Each handler must pay the producer *at the rate* of the minimum price fixed by the Secretary for each class of milk. This the handler does by paying the farmer the blend price. However, as all the handlers cannot use all their milk in fluid form, the Order creates a means of equalization among them known as the settlement fund. It protects each handler by assuring reimbursement to the extent the handler has paid its farmers, through the blend price, more than the milk was worth to it.

The fund works in this way. Each handler which has used its milk as Class I, and so received a greater value for it than it paid the farmer, pays this excess into the settlement fund. The handler who has used its milk as

Class II, and so received a lesser value for the milk than it paid the farmer, may then draw its reimbursement from the fund. This discussion omits, as immaterial here, reference to certain charges made against the handler and producer to cover the cost of operating the fund. It is plain that the settlement fund is merely a means of evening handlers' outlays for milk.

The first grievance of the appellee dairies — that the Co-op is made a handler — is that the Order thereby allows Co-op to draw upon the settlement fund into which they have paid. In practice it withdraws far more than any other handler, except sometimes Koontz, and if Co-op were merely a producer it could never draw thereon. In addition the complaint is that Co-op is permitted, as a handler, to divert milk into non-pool plants — not regulated by the Order and principally manufacturing facilities — with the result that it receives lower prices and thereby builds up its demand on the settlement fund.

This situation was closely scrutinized by the Secretary before shaping the Order. Foremost it must be kept in mind that no matter how much Co-op takes from the settlement fund, neither this fact nor the Order *requires* the appellee dairies to pay the producer at any rate above the minimum prices set by the Order. Furthermore, the Co-op absorbs for the most part the whole obligation of providing reserve or standby milk for Baltimore. It also disposes of all Class II milk for its large membership. Obviously these circumstances furnish ground for constituting the Co-op a handler. The Co-op would not, of course, by preference and through diversion sell its milk at lower prices than it could possibly obtain, for this would mean a diminution of the blend price and so reduction of the amount to be paid its members. We think the Secretary was not without ground for his classification of the Co-op.

It must be recalled that the Order is principally for the economic protection of producer and consumer, that the Co-op is actually its farmers, and that, so long as another handler is not unjustly treated, the Order may be drawn

to enhance the position of the producer. "If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market" is not objectionable. United States v. Rock Royal Co-op, *supra*, 307 U.S. 533, at 560.

The accusation against the Order in respect to Koontz is the same as that directed at Co-op but is premised on Koontz' odd posture. At Westminster, Koontz does not deal in the sale of Class I milk; it is primarily a manufacturer. Hence, it is not there a handler as ordinarily understood in the Order — it has no pool plant for fluid milk. Nevertheless the Order accords Koontz the character of a handler, and as such it participates in the settlement fund as a drawer. It is at this the appellee dairies take offense.

Of course Koontz-Westminster is in an anomalous position. But the Secretary found, and we think on ample ground, that it is a justified anomaly. Carefully considering the part played by Koontz in the milk market, he found that it performed a highly valuable function. Its plant at Westminster serves as a storage place for the milk of the Co-op farmers pending its disposition, and Koontz also provides an outlet for Class II milk in its manufactory. If it is not classed as a pool plant, each farmer will have to build his own bulk storage tank at considerable expense. Taking into consideration all of these features, the Secretary cannot be said to be arbitrary in allowing Koontz to be a handler.

The standing of the appellee dairies to raise and press the last two objections is quite questionable. These relate to the operation of the settlement fund, which in no wise affects parity or minimum prices. United States v. Rock Royal Co-op., *supra*, 307 U.S. 533, at 560. The handler is not hurt unless it is required to pay an unreasonable price for its milk. That is not alleged by appellees. No substantial harm to them is demonstrated in these objections but we have passed upon them, as apparently did the District Court, to avoid later uncertainty or litigation about the points.

After all, the Secretary must look at the area with a wide and comprehensive perspective. He has before him the entire output of milk in the area, and he must search for the best ways and means for its disposition. Aware of the annual consumption and distribution of fluid milk; he must arrange to channel the residue into outlets the most advantageous to the producer and consumer. He fashions his order accordingly. Of course, there may be some resultant damage to a handler or producer in the enforcement of the Act but this lack of perfection does not destroy the validity of the Order. The constitutionality of the Act is no longer questionable. United States v. Rock Royal Co-op., *supra*, 307 U.S. 533, 568-81. Absolute equality is not demanded to sustain the operation of the Order. If the Secretary cannot "produce complete equality, for the variables are too numerous", he "fulfills his role when he makes a reasoned" Order. Mitchell v. Budd, 350 U.S. 473, 480 (1956).

In conclusion, we reiterate that in this suit the District Court and this Court examine the case solely from a legal standpoint. They do not consider the evidence before the Secretary otherwise than to be assured his findings have support. The criterion is whether the Order is "in accordance with law". Here we cannot say it does not square with that standard.

The judgment of the District Court invalidating Federal Milk Marketing Order No. 127 (now No. 16) will be reversed and the causes now in review — in Appeals Nos. 8774, 8775, 8776, 8777, 8778, 8779 and 8849 — will be remanded to the District Court for the enforcement of the said Order in each of them, all cross appeals being denied.

Reversed and remanded.

DECREE

(Filed March 11, 1963)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8774

United States of America,

Appellant,

vs.

Howeth M. Mills and Crawford Mills, as individuals, and Howeth M. Mills and Crawford Mills, d b a Mills Dairy Products Company, a co-partnership,

Appellees.

Appeal from the United States District Court for the District of Maryland

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court invalidating Federal Milk Marketing Order No. 127 (now No. 16) be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for the enforcement of the said Order in accordance with the opinion of the Court filed herein.

SIMON E. SOBELOFF,
Chief Judge, Fourth Circuit.

ALBERT V. BRYAN,
United States Circuit Judge.

OPINION (PER CURIAM)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

(Filed April 26, 1963)

No. 8774

United States of America, Appellant,

versus

Howeth M. Mills, et al., Appellees.

No. 8775

United States of America, Appellant,

versus

Willow Farms Dairy, Inc., Appellee.

No. 8776

United States of America, Appellant,

versus

Brice G. Twilley, et al., Appellee.

No. 8777

United States of America, Appellant,

versus

Nesbit C. Murphy, et al., Appellee.

No. 8778

Howeth M. Mills, et al., Appellees,

versus

Orville L. Freeman, Secretary of Agriculture, Appellant.

No. 8779

Willow Farms Dairy, Inc., and Kenneth Barrick, et al., intervening plaintiffs, Appellees,

versus

Orville L. Freeman, Secretary of Agriculture, Appellant.

No. 8849

United States of America, Appellant and Cross-Appellee,

versus

Royal Farms Dairy, Inc., et al., Appellees and Cross-Appellants.

Per Curiam:

In cases Nos. 8779 and 8775, in which Willow Farms Dairy, Inc. and certain intervening producers were the appellees, a petition has been filed by them for a rehearing by the Court en banc or, in the alternative, before the division of the Court which heard the appeal. By an order heretofore entered the request for an en banc court has been denied. However, the original panel has now considered the petition and finds no ground for granting it.

While Willow Farms with its intervenors did request that the appeals in their cases be heard separately and apart from those in the companion suits, we concluded that it was advisable to hear all of them at one time, very much as the District Court had done, affording respective counsel for each of the several appellees an opportunity to be heard. Some common questions ran through all the actions and we believed that a joint presentation would more fully develop the points not only for the Court but for the benefit of every party. At all events, in the consideration of the record, briefs and oral arguments the Court was cognizant of such differences in the circumstances and conditions as existed as to some of the parties and weighed their contentions with that in mind.

Reference to the opinion of the Court will disclose that it discussed in detail the point now reiterated on the present petition in respect to parity price. To repeat, no *finding* of fact was made of this item by the Secretary of Agriculture. He made only an *ascertainment* by reference to certain official Government data of which he must under the statute take notice. Consequently, the testimony of the Secretary quoted in the petition is not to the contrary: that he did not "base any of [his] *findings* of fact . . . upon evidence or exhibits which were not a part of the hearing record".

Again, the petitioners are mistaken in their implication that the Court did not accord them legal standing to raise the points discussed in part IV of the opinion. It shows that these contentions were decided notwithstanding the Court had some doubt of the locus standi of the appellees to raise them.

On the last ground of the petition, only two judges heard the appeal because the third judge who was assigned to the case and had theretofore participated in one of the preliminary hearings — Judge Soper — was ill on the day of argument. He did not take part in the subsequent conferences on the case and died before its decision.

In other papers the present petitioners have asked the Court to stay its mandate and execution of its order herein until they have the opportunity of presenting a petition for certiorari to the United States Supreme Court. This suspension has been opposed by the United States both in its answer to the motion of these appellees as well as on its own motions for immediate release of the mandate and enforcement of the Milk Order as upheld in the opinion. The stay, we think, should be granted. Willow Farms from the inception of the Milk Order has punctually deposited into the registry of the trial court all moneys payable under the Milk Order. While consideration has been given to the view earnestly urged by the Government in respect to the injurious results of such a stay, in our judgment these appellees should be allowed the stay, with the understanding, of course, that Willow Farms will continue to

make the requisite payments into the registry of the District Court. In view of the stipulation previously made between the Government and Wilton Farm Dairy, Inc. — that the latter would abide the decision of the present controversy on the appeal of Willow Farms — the same stay will be awarded Wilton in case No. 8849, and on the same terms, as here permitted Willow Farms.

On the other hand, we do not now grant the motion of Mills et al., appellees in cases Nos. 8774 and 8778, for a similar stay because, since the issuance of the Milk Order, they have never set aside from their gross receipts any moneys to meet their obligations thereunder, or otherwise indicated a good faith intention to comply therewith, subject to the decision of the courts on the validity of the Order. Contempt proceedings in this Court were necessary to enforce payments for January and February, 1963 even into the registry of the District Court pendente lite. Moreover, the March assessment is currently overdue. To allow Mills, et al. to continue in disregard and default of the Milk Order would, we think, defeat the policy of the Agricultural Marketing Agreement Act, 7 U.S.C. §§601, 608c(15)(B), to the effect that proceedings testing the validity of a milk order should not delay the relief envisioned by the Act. Of course, any stay whatsoever will have this result in some degree, but whenever granting a stay in this litigation we have balanced the equities between the handler and the producer, and where they are found to favor the handler without undue injury to the producer, we have impinged upon the policy of the Act in order to prevent apparently irretrievable harm to the handler pending appeal. This entrenchment upon the policy is minimized by insisting upon continuance of the payments although they are put into the registry of the District Court. When, however, the handler makes no effort to meet the policy of the Act, as have Mills, et al., and thus to entirely thwart it, we do not feel justified in granting a stay which would abet the intransigent handler.

Nevertheless, if within 10 days of the entry of the order accompanying this opinion, appellees Mills, et al. pay into

the registry of the District Court all the sums accrued and payable by them under the Milk Order from its effective date until the present time, the Court on proof thereof will grant them a stay of its mandate and order to the same extent it has been allowed to appellees Willow Farms, et al.

In No. 8849, appellee Aristocrat Dairy moves to deny the Government's motion for an immediate mandate and enforcement of our order and itself moves for a stay of the order. This appellee has made the required milk payments into the registry of the District Court save for the month of March, 1963. Upon meeting this current obligation, Aristocrat's motion will be granted upon the same terms and conditions as have heretofore been allowed in the instance of Willow Farms.

Order in Accordance with
Foregoing Opinion.

April 25th 1963.

ORDER DENYING PETITION FOR REHEARING AND RULING ON MOTIONS OF CERTAIN APPELLEES FOR STAY PENDING APPLICATION FOR CERTIORARI

(Filed April 26, 1963)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8774

United States of America, Appellant,

versus

Howeth M. Mills, et al., Appellees.

No. 8775

United States of America, Appellant,

versus

Willow Farms Dairy, Inc., Appellee.

No. 8776

United States of America, Appellant,

versus

Brice G. Twilley, et al., Appellee.

No. 8777

United States of America, Appellant,

versus

Nesbit C. Murphy, et al., Appellee.

No. 8778

Howeth M. Mills, et al., Appellees,

versus

Orville L. Freeman, Secretary of Agriculture, Appellant.

No. 8779

Willow Farms Dairy, Inc., and Kenneth Barrick, et al., intervening plaintiffs, Appellees,

versus

Orville L. Freeman, Secretary of Agriculture, Appellant.

No. 8849

United States of America, Appellant and Cross-Appellee,

versus

Royal Farms Dairy, Inc., et al., Appellees and Cross-Appellants.

Upon consideration of the petition for rehearing by the Willow Farms Dairy, et al., appellees in cases Nos. 8779 and 8775; the motions of the United States and Orville L.

Freeman, Secretary of Agriculture, the appellants in all of these cases, for issuance of mandate and immediate enforcement of the order of this Court entered March 11, 1963; the memorandum of Howeth M. Mills and Crawford Mills, etc., appellees in cases Nos. 8774 and 8778 opposing appellants' motion for the issuance of mandate, and seeking a stay of mandate and relief from obligation to make payments pending review of the decision of this Court; motion of Wilton Farm Dairy, Inc., appellee in case No. 8849, to vacate the said order of this Court; and the motion of Aristocrat Dairy, another appellee in No. 8849 to stay mandate and the said order of this Court, it is, for the reasons set forth in the opinion this day filed,

ORDERED as follows:

1. That the said petition for rehearing be, and it is hereby, denied;

2. That, upon condition that they file their petition for certiorari to the United States Supreme Court within 30 days from this date, the said order of this Court entered on March 11, 1963 be, and it is hereby, stayed in cases Nos. 8779 and 8775 until said petition for certiorari is filed and, thereafter, until the said petition is acted upon by the United States Supreme Court;

3. That in case No. 8849, with respect to Wilton Farm Dairy, Inc. and Aristocrat Dairy the said order of this Court be, and it is hereby, stayed pending disposition of the petition for certiorari in cases Nos. 8779 and 8775, as outlined in paragraph 2 above;

4. That the motion for a stay by Howeth M. Mills and Crawford Mills, etc., appellees in cases Nos. 8774 and 8778, be, and it is hereby, denied, provided, however, that if they shall within 10 days from the entry of this order pay into the registry of the United States District Court for the District of Maryland the remainder of the moneys payable by them under Milk Order No. 16 from January 1, 1960, the effective date of said Milk Order, until the date hereof, the said order of this Court shall, on proof of said payment,

be stayed in the same manner and to the same extent as the stay hereinbefore granted to appellees Willow Farms Dairy, Inc., et al. in paragraph 2 of this order; and

5. That the said stays hereinbefore granted shall remain in effect only while the appellees procuring said stays shall continue to pay into the registry of the said District Court, as and when due, the moneys payable by them under the said Milk Order No. 16.

SIMON E. SOBELOFF,
Chief Judge of the Fourth Circuit.

ALBERT V. BRYAN,
United States Circuit Judge.

April 25th, 1963.

STATUTES

The pertinent parts of the Agricultural Marketing Agreement Act of 1937 as amended, 7 U.S.C. 601 *et seq.*, are the following:

7 U.S.C. 601

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

7 U.S.C. 602

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commod-

ities in interstate commerce as will establish, as the prices to farmers parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613-619, 620, 623, and 624 of this title, to establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

7 U.S.C. 608a(6)

The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623 and 624 of this title, in any proceeding now pending or hereafter brought in said courts.

* * * * * *

7 U.S.C. 608c(1)

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601-608, 608a, 608b, 608c, 608d-612 613, 614-619, 620, 623, and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

7 U.S.C. 608c(2)

Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except products of naval stores and the products of honeybees), or to any regional, or market classification, of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, and Idaho, and not including fruits, other than olives, for canning or freezing), tobacco, veg-

etables (not including vegetables, other than asparagus, for canning or freezing), soybeans, hops, honeybees and naval stores as included in sections 91-99 of this title and standards established thereunder (including refined or partially refined oleresin).

7 U.S.C. 608c(3)

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for hearing upon a proposed order.

7 U.S.C. 608c(4)

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to such commodity.

7 U.S.C. 608c(5)

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for

milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by t' e handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketing of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this section.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association

and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

7 U.S.C. 608c(6) — not applicable

7 U.S.C. 608c(7)

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to

be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order.

7 U.S.C. 608c(8)

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided*, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been en-

gaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

7 U.S.C. 608c(9)

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof

(except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

7 U.S.C. Section 608c(10)

(10) *Manner of regulation and applicability.*

No order shall be issued under this section unless it regulates the handling of the commodity or product cov-

ered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

7 U.S.C. 608c(11) — not applicable.

7 U.S.C. 608c(12)

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

7 U.S.C. 608c(13)(A)

No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title shall be applicable to any producer in his capacity as a producer.

7 U.S.C. 608c(14) — not applicable.

7 U.S.C. 608c(15)(A)

Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to the subsection shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties and covering the same subject matter, instituted pursuant to this subsection.

7 U.S.C. 608c(16) and (17) — not applicable.

7 U.S.C. 608c(18)

The Secretary of Agriculture prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is ~~to fix~~ minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after ~~due notice and opportunity for hearing~~, make adjustments in such prices.

7 U.S.C. 608c(19)

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of sections 601-604, 607-608a, 608b, 608c, 608d, 608e-1 to

612, 613, 614-619, 620, 623 and 624 of this title, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision, shall be held to be complied with it, of the total number of producers or processors, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section.

ADMINISTRATIVE PROCEDURE ACT OF 1946, AS AMENDED
5 U.S.C. 1004(b) AND 1006(c)

§1004. *Adjudications.*

* * * * * *

Procedure

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

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§1006. *Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision.*

* * * * * *

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

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RULES OF PRACTICE GOVERNING PROCEEDINGS AND PETITIONS TO MODIFY OR TO BE EXEMPTED FROM MARKETING ORDERS
25 F.R. 5911-5917, June 28, 1960;

7 C.F.R., CH. IX

Title 7 — Agriculture

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Chapter IX — Agricultural Marketing Service (Marketing Agreements and Orders), Department of Agriculture

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Subpart — Rules of Practice Governing Proceedings on Petitions to Modify or To Be Exempted From Marketing Orders

Authority: §§900.50 to 900.71 issued under sec. 5, 49 Stat. 753, as amended; 7 U.S.C. 608c.

§900.50. Words in the singular form.

Words in this subpart in the singular form shall be deemed to import the plural, and vice versa, as the case may demand.

§900.51. Definitions.

As used in this subpart, the terms as defined in the act shall apply with equal force and effect. In addition, unless the context otherwise requires:

(a) The term "act" means Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. and Sup. 601);

(b) The term "Department" means the United States Department of Agriculture;

(c) The term "Secretary" means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in his stead;

(d) The term "examiner" means any examiner in the Office of Hearing Examiners, United States Department of Agriculture;

(e) The term "Deputy Administrator" means any Deputy Administrator of the Agricultural Marketing Service of the Department or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in his stead;

(f) The term "Service" means the Agricultural Marketing Service of the Department;

(g) The term "Federal Register" means the publication provided for by the act of July 26, 1935 (49 Stat. 500), and acts supplementary thereto and amendatory thereof;

(h) The term "marketing order" means any order or any amendment thereto which may be issued pursuant to section 8c of the act;

(i) The term "handler" means any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable;

(j) The term "proceeding" means a proceeding before the Secretary arising under subsection (15) (A) of section 8c of the act;

(k) The term "hearing" means that part of the proceeding which involves the submission of evidence;

(l) The term "party" includes the Department;

(m) The term "hearing clerk" means the hearing clerk, United States Department of Agriculture, Washington, D.C.;

(n) The term "presiding officer" means the examiner conducting a proceeding under the act;

(o) The term "presiding officer's report" means the presiding officer's report to the Secretary and includes the presiding officer's proposed (1) findings of fact and conclusions with respect to all material issues of fact, law or discretion, as well as the reasons or basis therefor, (2) order and (3) rulings on findings, conclusions and orders submitted by the parties;

(p) The term "petition" includes an amended petition.

§900.52. Institution of proceeding.

(a) *Filing and service of petition.* Any handler desiring to complain that any marketing order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law, shall file with the hearing clerk, in quadruplicate, a petition in writing addressed to the Secretary. Promptly upon receipt of the petition, the hearing clerk shall transmit a true copy thereof to the Deputy Administrator and the General Counsel, respectively.

(b) *Contents of petition.* A petition shall contain:

(1) The correct name, address, and principal place of business of the petitioner. If petitioner is a corporation,

such fact shall be stated, together with the name of the State of incorporation, the date of incorporation, and the names, addresses, and respective positions held by its officers and directors; if an unincorporated association, the names and addresses of its officers, and the respective positions held by them; if a partnership, the name and address of each partner;

(2) Reference to the specific terms or provisions of the order, or the interpretation or application thereof, which are complained of;

(3) A full statement of the facts (avoiding a mere repetition of detailed evidence) upon which the petition is based, and which it is desired that the Secretary consider, setting forth clearly and concisely the nature of the petitioner's business and the manner in which petitioner claims to be affected by the terms or provisions of the order, or the interpretation or application thereof, which are complained of;

(4) A statement of the grounds on which the terms or provisions of the order, or the interpretation or application thereof, which are complained of, are challenged as not in accordance with law;

(5) Prayers for the specific relief which the petitioner desires the Secretary to grant;

(6) An affidavit by the petitioner, or, if the petitioner is not an individual, by an officer of the petitioner having knowledge of the facts stated in the petition, verifying the petition and stating that it is filed in good faith and not for purposes of delay.

(c) *Application to dismiss petition* — (1) *Filing, contents, and responses thereto.* If the Deputy Administrator is of the opinion that the petition, or any portion thereof, does not substantially comply, in form or content, with the act or with the requirements of paragraph (b) of this section, or is not filed in good faith, or is filed for purposes of delay, he may, within 30 days after the filing of the petition, file with the hearing clerk an application to

dismiss the petition, or any portion thereof, on one or more of the grounds stated in this paragraph. Such application shall specify the grounds of objection to the petition and if based, in whole or in part, on allegations of fact not appearing on the face of the petition, shall be accompanied by appropriate affidavits or documentary evidence substantiating such allegations of fact. The application may be accompanied by a memorandum of law. Upon receipt of such application, the hearing clerk shall cause a copy thereof to be served upon the petitioner, together with a notice stating that all papers to be submitted in opposition to such application, including any memorandum of law, must be filed by the petitioner with the hearing clerk not later than 20 days after the service of such notice upon the petitioner. Upon the expiration of the time specified in such notice, or upon receipt of such papers from the petitioner, the hearing clerk shall transmit all papers which have been filed in connection with the application to the Secretary for his consideration.

(2) *Decision by Secretary.* The Secretary, after due consideration, shall render a decision upon the application, stating the reasons for his action. Such decision shall be in the form of an order and shall be filed with the hearing clerk who shall cause a copy thereof to be served upon the petitioner and a copy thereof to be transmitted to the Deputy Administrator. Any such order of the Secretary shall be a final order: *Provided*, That within 20 days following the service upon the petitioner of a copy of an order of the Secretary dismissing the petition, or any portion thereof, on the ground that it does not substantially comply in form and content with the act or with paragraph (b) of this section, the petitioner shall be permitted to file an amended petition.

(3) *Referral to presiding officer.* The Secretary may, in his discretion, refer any application made under this section to the presiding officer for preliminary consideration and report, and, in a proper case, for the taking of evidence: *Provided*, That the provisions of §§ 900.60 to 900.65, inclusive, shall be applicable to the reception of such evi-

dence, if any; the form, content, and filing of such report; the allowance of exceptions thereto; and transmittal of the record to the Secretary.

(4) *Oral argument.* Unless a written application for oral argument is filed by a party with the hearing clerk not later than the time fixed for filing papers in opposition to the application, it shall be considered that the party does not desire oral argument. The granting of a request to make oral argument shall rest in the discretion of the Secretary or the presiding officer, as the case may be.

§900.52a. Answer to petition.

(a) *Time of filing.* Within 30 days after the filing of the petition, the Deputy Administrator shall file an answer thereto: *Provided*, That if an application to dismiss the petition, in whole or in part, is made pursuant to §900.52(c), the answer shall be filed within 15 days after the filing of an order of the Secretary denying the application or granting the application with respect to only a portion of the petition. The answer shall be filed with the hearing clerk who shall cause a copy thereof to be served promptly upon the petitioner.

(b) *Contents.* The answer shall specify which of the material allegations of fact or of law in the petition are controverted and which are not controverted. The answer also may contain affirmative allegations of fact constituting separate defenses and statements of objections to the sufficiency of the whole or any part of the petition.

§900.52b. Amended pleadings.

At any time before the close of the hearing the petition or answer may be amended, but the hearing shall, at the request of the adverse party, be adjourned or recessed for such reasonable time as the presiding officer may determine to be necessary to protect the interests of the parties. Amendments subsequent to the first amendment or subsequent to the filing of an answer may be made only with leave of the presiding officer or with the written consent of the adverse party.

§900.53. Withdrawal of petition.

If, at any time after the petition is filed, the petitioner desires to withdraw the same, he shall file with the hearing clerk (or, if filed during the course of a hearing, with the presiding officer) a written request for permission to withdraw. The Secretary may, in his discretion, thereupon dismiss the petition without further procedure: *Provided*, That, if the request to withdraw is filed after a hearing has been opened, permission to withdraw shall be granted only in exceptional circumstances.

§900.54. Docket number.

Each proceeding, immediately following its institution, shall be assigned a docket number by the hearing clerk and thereafter the proceeding may be referred to by such number.

§900.55. Presiding officers.

(a) *Assignment.* No presiding officer who has any pecuniary interest in the outcome of the proceeding, or who has participated in any investigation preceding the institution of the proceeding, shall serve as presiding officer in such proceeding.

(b) *Conduct.* The presiding officer shall conduct the proceeding in a fair and impartial manner and shall not discuss ex parte the merits of the proceeding with any person who is or who has been connected in any manner with the proceeding in an advocative or investigative capacity.

(c) *Powers of presiding officers.* Subject to review by the Secretary, as provided elsewhere in this subpart, the presiding officer shall have power to:

(1) Rule upon motions and requests;

(2) Adjourn the hearing from time to time, and change the time and place of hearing;

(3) Administer oaths and affirmations and take affidavits;

(4) Issue subpenas, under the facsimile signature of the Secretary, requiring the attendance and testimony of witnesses and the production of books, records, contracts, papers, and other documentary evidence;

(5) Examine withesses and receive evidence;

(6) Take or order, under the facsimile signature of the Secretary, the taking of depositions;

(7) Admit or exclude evidence;

(8) Hear oral argument on facts or law;

(9) Consolidate hearings upon two or more petitions pertaining to the same order;

(10) Do all acts and take all measures necessary for the maintenance of order at the hearing and the efficient conduct of the proceeding.

(d) *Who may act in absence of presiding officer.* In case of the absence of the presiding officer or his inability to act, the powers and duties to be performed by him under these rules of practice in connection with a proceeding may, without abatement of the proceeding unless otherwise ordered by the Secretary, be assigned to any other presiding officer.

(e) *Disqualification of presiding officer.* The presiding officer may at any time withdraw as presiding officer in a proceeding if he deems himself to be disqualified. Upon the filing by an interested person in good faith of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the Secretary shall determine the matter as a part of the record and decision in the proceeding, after making such investigation or holding such hearings, or both, as he may deem appropriate in the circumstances.

§900.56. Consolidated hearings.

At the discretion of the presiding officer, hearings upon two or more petitions pertaining to the same order may be consolidated, and the evidence taken at such consolidated hearing may be embodied in a single record.

§900.57. Intervention.

Intervention in proceedings subject to this subpart shall not be allowed, except that, in the discretion of the Secretary or the presiding officer, any person (other than the petitioner) showing a substantial interest in the outcome of a proceeding shall be permitted to participate in the oral argument and to file a brief.

§900.58. Prehearing conferences.

In any proceeding in which it appears that such procedure will expedite the proceeding, the presiding officer, at any time prior to the commencement of or during the course of the hearing, may request the parties or their counsel to appear at a conference before him to consider (a) the simplification of issues; (b) the possibility of obtaining stipulations of fact and of documents which will avoid unnecessary proof; (c) the limitation of the number of expert or other witnesses; and (d) such other matters as may expedite and aid in the disposition of the proceeding. No transcript of such conference shall be made, but the presiding officer shall prepare and file for the record a written summary of the action taken at the conference, which shall incorporate any written stipulations or agreements made by the parties at the conference or as a result of the conference. If the circumstances are such that a conference is impracticable, the presiding officer may request the parties to correspond with him for the purpose of accomplishing any of the objects set forth in this section. The presiding officer shall forward copies of letters and documents to the parties as the circumstances require. Correspondence in such negotiations shall not be a part of the record, but the presiding officer shall submit a written summary for the record if any action is taken.

§900.59. Motions and requests.

(a) *General.* All motions and requests shall be filed with the hearing clerk, except that those made during the course of an oral hearing may be filed with the presiding officer or may be stated orally and made a part of the transcript.

The presiding officer is authorized to rule upon all motions and requests filed or made prior to the transmittal by the hearing clerk to the Secretary of the record as provided in this subpart. The Secretary shall rule upon all motions and requests filed after that time.

(b) *Certification of motions.* The submission or certification of any motion, request, objection, or other question to the Secretary prior to the transmittal of the record to the Secretary, as provided in this subpart, shall be in the discretion of the presiding officer.

§900.60. Oral hearings before presiding officer.

(a) *Time and place.* The presiding officer shall set a time and place for hearing and shall file with the hearing clerk a notice stating the time and place of hearing. If any change in the time or place of hearing becomes necessary, it shall be made by the presiding officer, who, in such event, shall file with the hearing clerk a notice of the change. Such notice shall be served upon the parties, unless it is made during the course of an oral hearing and made a part of the transcript.

(b) *Appearances*—(1) *Representation.* In any proceeding under the act, the parties may appear in person or by counsel or other representative. The Department, if represented by counsel, shall be represented by an attorney assigned by the General Counsel of the Department, and such attorney shall present or supervise the presentation of the position of the Department.

(2) *Debarment of counsel or representative.* Whenever, while a proceeding is pending before him, the presiding officer finds that a person acting as counsel or representative for any party to the proceeding is guilty of unethical or unprofessional conduct, the presiding officer may order that such person be precluded from further acting as counsel or representative in such proceeding. An appeal to the Secretary may be taken from any such order, but the proceeding shall not be delayed or suspended pending disposition of the appeal: *Provided*, That the presiding officer

may suspend the proceeding for a reasonable time for the purpose of enabling the client to obtain other counsel or representative.

In case the presiding officer has issued an order precluding a person from further acting as counsel or representative in the proceeding, the presiding officer, within a reasonable time thereafter, shall submit to the Secretary a report of the facts and circumstances surrounding the issuance of the order and shall recommend what action the Secretary should take respecting the appearance of such person as counsel or representative in other proceedings before the Secretary. Thereafter, the Secretary may, after notice and an opportunity for hearing, issue such order respecting the appearance of such person as counsel or representative in proceedings before the Secretary as the Secretary finds to be appropriate.

(3) *Failure to appear.* If the petitioner, after being duly notified, fails to appear at the hearing; he shall be deemed to have authorized the Secretary, without further procedure, to dismiss the proceeding with or without prejudice, as the Secretary may determine. In the event that the petitioner appears at the hearing and no representative of the Department appears, the presiding officer shall proceed ex parte to hear the evidence of the petitioner: *Provided*, That failure on the part of such representative of the Department to appear at a hearing shall not be deemed as to be a waiver of the Department's right to file suggested findings of fact, conclusions, and order; to be served with a copy of the presiding officer's report; and to file exceptions with and to submit argument before the Secretary with respect thereto.

(c) *Order of proceeding.* Except as may be determined otherwise by the presiding officer, the petitioner shall proceed first at the hearing.

(d) *Evidence*—(1) *In general.* The hearing shall be publicly conducted, and the testimony given at the hearing shall be reported verbatim.

The testimony of witnesses at a hearing shall be upon oath or affirmation and subject to cross-examination.

Any witness may, in the discretion of the presiding officer, be examined separately and apart from all other witnesses except those who may be parties to the proceeding.

The presiding officer shall exclude, insofar as practicable, evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely.

(2) *Objections.* If a party objects to the admission or rejection of any evidence or to the limitation of the scope of any examination or cross-examination, he shall state briefly the grounds of such objection, whereupon an automatic exception will follow if the objection is overruled by the presiding officer. The transcript shall not include argument or debate thereon, except as ordered by the presiding officer. The ruling of the presiding officer on any objection shall be a part of the transcript.

Only objections made before the presiding officer may subsequently be relied upon in the proceeding.

(3) *Depositions.* The deposition of any witness shall be admitted, in the manner hereinafter provided in and subject to the provisions of §900.61.

(4) *Affidavits.* Except as is otherwise provided in this subpart, affidavits may be admitted only if the evidence is otherwise admissible and the parties agree (which may be determined by their failure to make timely objections) that affidavits may be used.

(5) *Proof and authentication of official records or documents.* An official record or document, when admissible for any purpose, shall be admissible in evidence without the production of the person who made or prepared the same. Such record or document shall, in the discretion of the presiding officer, be evidenced by an official publication thereof or by a copy attested by the person having legal custody thereof and accompanied by a certificate that such person has the custody.

(6) *Exhibits.* All written statements, charts, tabulations, or similar data offered in evidence at the hearing shall, after identification by the proponent and upon a satisfactory showing of the admissibility of the contents thereof, be numbered as exhibits and received in evidence and made a part of the record. Except where the presiding officer finds that the furnishing of copies is impracticable, a copy of each exhibit, in addition to the original, shall be filed with the presiding officer for the use of each other party to the proceeding. The presiding officer shall advise the parties as to the exact number of copies which will be required to be filed and shall make and have noted on the record the proper distribution of the copies.

If the testimony of a witness refers to a statute, or to a report, document, or transcript, the presiding officer, after inquiry relating to the identification of such statute, report, document, or transcript, shall determine whether the same shall be produced at the hearing and physically be made a part of the evidence as an exhibit, or whether it shall be incorporated into the evidence by reference. If relevant and material matter offered in evidence is embraced in a report, document, or transcript containing immaterial or irrelevant matter, such immaterial or irrelevant matter shall be excluded and shall be segregated insofar as practicable, subject to the direction of the presiding officer.

(7) *Official notice.* Official notice will be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character: *Provided*, That the parties shall be given adequate notice, at the hearing or by reference in the presiding officer's report or the tentative order or otherwise, of matters so noticed, and (except where official notice is taken for the first time in the proceeding, in the final order) shall be given adequate opportunity to show that such facts are erroneously noticed.

(8) *Offer of proof.* Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the transcript. The offer of proof shall consist of a brief statement describ-

ing the evidence to be offered. If the evidence consists of a brief oral statement or of an exhibit, it shall be inserted into the transcript in toto. In such event, it shall be considered a part of the transcript if the Secretary decides that the presiding officer's ruling in excluding the evidence was erroneous. The presiding officer shall not allow the insertion of such evidence in toto if the taking of such evidence will consume a considerable length of time at the hearing. In the latter event, if the Secretary decides that the presiding officer erred in excluding the evidence, and that such error was substantial, the hearing shall be reopened to present the taking of such evidence.

(e) *Oral argument before presiding officer.* Oral argument before the presiding officer shall be allowed unless the presiding officer finds that the denial of such argument will not deprive the parties of an adequate opportunity for oral argument subsequently in the proceeding. Such argument may be limited by the presiding officer to any extent that he finds necessary for the expeditious disposition of the proceeding and shall be redueed to writing and made part of the transcript.

(f) *Transcript.* (1) During the period in which the proceeding has an active status in the Department, a copy of the transcript and exhibits shall be kept on file in the office of the hearing clerk, where it shall be available for examination during official hours of business. Thereafter said transcript and exhibits shall be made available by the hearing clerk for examination during official hours of business after prior request and reasonable notice to the hearing clerk.

(2) If a personal copy of the transcript is desired, such copy may be obtained upon written application filed with the reporter, and upon payment of fees at the rate (if any) provided in the contract between the reporter and the Secretary.

§900.61 Depositions

(a) *Procedure in lieu of deposition.* Before any party may have testimony taken by deposition, said party shall,

if practicable, submit to the other party an affidavit which shall set forth the facts to which the witness would testify, if the deposition should be taken. If, after examination of such affidavit, the other party agrees, or (within 10 days after submission of the affidavit) fails to object, that the affidavit may be used in lieu of the deposition, the presiding officer shall admit the affidavit in evidence and shall not order the deposition to be taken.

(b) *Application for taking deposition.* Upon the application of a party to the proceeding, the presiding officer may, at any time after the filing of the moving paper, order, under the facsimile signature of the Secretary, the taking of testimony by deposition. The application shall be in writing and shall be filed with the hearing clerk and shall set forth: (1) the name and address of the proposed deponent; (2) the name and address of the person (referred to hereinafter in this section as the "officer"), qualified under the rules in this part to take depositions, before whom the proposed examination is to be made; (3) the proposed time and place of the examination, which shall be at least 15 days after the date of the mailing of the application; and (4) the reasons why such deposition should be taken.

(c) *Presiding officer's order for taking deposition.* If, after the examination of the application, the presiding officer is of the opinion that the deposition should be taken, he shall order its taking. The order shall be filed with the hearing clerk and shall be served upon the parties and shall state: (1) the time and place of the examination (which shall not be less than 10 days after the filing of the order); (2) the name of the officer before whom the examination is to be made; (3) the name of the deponent. The officer and the time and place need not be the same as those suggested in the application.

(d) *Qualifications of officer.* The deposition shall be taken before the presiding officer, or before an officer authorized by the law of the United States or by the law of the place of the examination to administer oaths, or before an officer authorized by the Secretary to administer oaths.

(e) *Procedure on examination.* The deponent shall be examined under oath or affirmation and shall be subject to cross-examination. The testimony of the deponent shall be recorded by the officer or by some person under his direction and in his presence. In lieu of oral examination, parties may transmit written interrogatories to the officer prior to the examination and the officer shall propound such interrogatories to the deponent.

The applicant must arrange for the examination of the witness either by oral examination or by written interrogatories. If it is found by the presiding officer, upon the protest of a party to the proceeding, that such party has his residence and his place of business more than 100 miles from the place of the examination and that it would constitute an undue hardship upon such party to be represented at the examination, the applicant will be required to conduct the examination by means of interrogatories. When the examination is conducted by means of interrogatories, copies of the interrogatories shall be served upon the other parties to the proceeding at least five days prior to the date set for the examination, and the other parties shall be afforded an opportunity to file with the officer cross-interrogatories at any time prior to the time of the examination.

(f) *Certification by officer.* The officer shall certify on the deposition that the deponent was duly sworn by him and that the deposition is a true record of the deponent's testimony. He shall then securely seal the deposition, together with two copies thereof, in an envelope and mail the same by registered mail to the hearing clerk.

(g) *Use of depositions.* A deposition ordered and taken in accord with the provisions of this section may be used in a proceeding under the act if the presiding officer finds that the evidence is otherwise admissible and (1) that the witness is dead; or (2) that the witness is at a distance greater than 100 miles from the place of hearing, unless it appears that the absence of the witness was procured by the party offering the deposition; or (3) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (4) that the party offering the

deposition has endeavored to procure the attendance of the witness by subpena but has been unable to do so; or (5) that such exceptional circumstances exist as to make it desirable, in the interests of justice, to allow the deposition to be used. If a deposition has been taken, and the party upon whose application it was taken refuses to offer it in evidence, the other party may offer the deposition, or any part thereof, in evidence.

§900.62. Subpenas.

(a) *Issuance of subpenas.* The attendance of witnesses and the production of documentary evidence from any place in the United States on behalf of any party to the proceeding may, by subpena, be required at any designated place of hearing. Subpenas may be issued by the Secretary or by the presiding officer, under the facsimile signature of the Secretary, upon a reasonable showing by the applicant of the grounds, necessity, and reasonable scope thereof.

(b) *Application for subpena duces tecum.* Subpenas for the production of documentary evidence, unless issued by the presiding officer upon his own motion, shall be issued only upon a verified written application. Such application shall specify, as exactly as possible, the documents desired and shall show their competency, relevancy, and materiality and the necessity for their production.

(c) *Service of subpenas.* Subpenas may be served (1) by a United States Marshal or his deputy, or (2) by any other person who is not less than 18 years of age, or (3) by registering and mailing a copy of the subpena addressed to the person to be served at his or its last known residence or principal place of business or residence. Proof of service may be made by the return of service on the subpena by the United States Marshal or his deputy; or, if served by an individual other than a United States Marshal or his deputy, by an affidavit of such person stating that he personally served a copy of the subpena upon the person named therein; or, if service was by registered mail, by an affidavit made by the person mailing the subpena that it was mailed as provided in this paragraph and by the signed return post-

office receipt: *Provided*, That, if the subpena is issued on behalf of the Department, the return receipt without an affidavit of mailing shall be sufficient proof of service. In making personal service, the person making service shall leave a copy of the subpena with the person subpenaed; the original, bearing or accompanied by the required proof of service, shall be returned to the official who issued the same.

§900.63. Fees and mileage.

Witnesses who are subpenaed and who appear in such proceeding, including witnesses whose depositions are taken, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and persons taking depositions shall be entitled to the same fees as are paid for like services in the courts of the United States, to be paid by the party at whose request the deposition is taken. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear, and claims therefor, as to witnesses subpenaed on behalf of the Department, shall be proved before the person issuing the subpena, and, as to witnesses subpenaed on behalf of any other party, shall be presented to such party.

§900.64. The presiding officer's report.

(a) *Filing the transcript of evidence.* (1) As soon as practicable after the close of the hearing, the presiding officer shall transmit to the hearing clerk an original and three copies of the transcript of the testimony and the original and all copies of the exhibits not already on file in the office of the hearing clerk. The presiding officer shall attach to the original transcript of testimony his certificate stating that to the best of his knowledge and belief, the transcript is a true, correct, and complete transcript of the testimony given in the hearing except in such particulars as he shall specify, and that the exhibits transmitted are all the exhibits received in evidence at the hearing with such exceptions as he shall specify. A copy of such certification shall be attached to each copy of the transcript of testimony. In accordance with such certificate the presid-

ing officer shall note on the original transcript and the hearing clerk shall cause to be noted on other copies of the transcript each correction detailed in such certificate by adding or crossing out (but without obscuring the text as originally transcribed) at the appropriate places any words necessary to make the text conform to the correct meaning, as certified by the presiding officer.

(2) Immediately following the filing of the transcript, the hearing clerk shall advise each party to the proceeding as to the date of such filing.

(b) *Proposed findings of fact, conclusions, and orders.* Within 10 days (unless the presiding officer shall have announced at the hearing a shorter or longer period of time) after the transcript has been filed with the hearing clerk, as provided in paragraph (a) of this section, each party may file with the hearing clerk proposed findings of fact, conclusions, and order, based solely upon the evidence of record, and briefs in support thereof.

(c) *Presiding officer's report.* The presiding officer, within a reasonable time after the termination of the period allowed for the filing of proposed findings of fact, conclusions, and orders, and briefs in support thereof, shall prepare, upon the basis of the record, and shall file with the hearing clerk, his report, a copy of which (together with notification of the date fixed by the presiding officer for the filing of exceptions thereto) shall be served by the hearing clerk upon each of the parties.

(d) *Exception.* Within a period of time (to be fixed by the presiding officer but not to exceed 20 days) after the filing of the presiding officer's report, the parties may file exceptions to the report. Any party who desires to take exception to any matter set out in the report shall transmit his exceptions in writing to the hearing clerk, referring, where practicable, to the relevant pages of the transcript, and suggesting a corrected finding of fact, conclusion, or order. Within the same period of time, each party shall transmit to the hearing clerk a brief statement in writing concerning each of the objections taken to the action of the presiding officer, as set out in §900.60, upon which the party

wishes to rely, referring, where practicable, to the pertinent pages of the transcript. A party, if he files exceptions or a statement of objections, shall state in writing whether he desires to make an oral argument thereon before the Secretary; otherwise, it shall be considered that he does not desire to make such oral argument.

(c) *Revision of presiding officer's report.* If exceptions are filed to the presiding officer's report, as provided in paragraph (d) of this section, the presiding officer, after consideration of such exceptions shall make and file with the hearing clerk a draft of the findings of fact, conclusions, and final order of the Secretary, which shall include such revision of his report as he deems to be appropriate in view of such exceptions.

§900.65. Transmittal of record.

The hearing clerk, immediately following the filing of the revision of the presiding officer's report, or upon notification by the presiding officer that no revision will be made, shall transmit to the Secretary the record of the proceeding. Such record shall include: the petition; motions and requests filed with the hearing clerk, and rulings thereon; the transcript of the testimony taken at the hearing, together with the exhibits filed therein; any documents or papers filed in connection with prehearing conferences; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the hearing; the presiding officer's report; such exceptions, statements of objections, and briefs in support thereof, as may have been filed in the proceeding; and the presiding officer's draft of the findings of fact, conclusions, and final order of the Secretary.

§900.66. Argument before Secretary.

(a) *Oral argument.* Unless a party has included in his exceptions a request for oral argument or has filed a separate request for oral argument prior to the expiration of the last date for filing such exceptions, it shall be considered that he does not desire to make such oral argument.

The granting of a request to make oral argument shall rest in the discretion of the Secretary.

(b) *Briefs.* The parties may, in the discretion of the Secretary, file written briefs either in addition to oral argument or in lieu thereof.

(c) *Scope of argument.* Except where the Secretary determines that argument on additional issues would be helpful, argument, whether oral or in a written brief, shall be limited to the issues raised by the exceptions and statement of objections, or to such issues as the Secretary may indicate. If the Secretary determines that additional issues should be argued, counsel for the parties shall be given reasonable notice of such determination, so as to permit the preparation of adequate argument on all the issues to be argued.

§900 67. Consideration and issuance of order.

(a) *Consideration of order.* As soon as practicable after the receipt of the record from the hearing clerk, or in case argument was had, as soon as practicable thereafter, the Secretary, upon the basis of the record, shall begin his consideration of the final order to be issued in the proceeding. If an oral argument was held, the order shall be considered by and shall be issued over the signature of the official who heard such oral argument, unless the parties shall consent to a different arrangement. At no stage of the proceeding between its institution and the issuance of the order shall the Secretary discuss ex parte the merits of the proceeding with any person who is connected with the proceeding in an advocative or an investigative capacity, or with any representative of such person: *Provided, however,* That the Secretary may discuss the merits of the proceeding with such a person if all parties to the proceeding, or their representatives, have been given an opportunity to be present. If, notwithstanding the foregoing provisions of this section, a memorandum or other communication from any party, or from any person acting on behalf of any party, which relates to the merits of the proceeding, receives the personal attention of the Secretary (or, if an official other

than the Secretary is to issue the order, then of such other official) during the pendency of the proceeding, such memorandum or communication shall be regarded as argument made in the proceeding and shall be filed with the hearing clerk, who shall serve a copy thereof upon the opposite party to the proceeding, and opportunity shall be given the opposite party to file a reply thereto.

(b) *Issuance of order.* The order shall be issued and served upon the parties as the final order in the proceeding without further procedure: *Provided*, That, if the terms of the order differ substantially from those proposed in the report of the presiding officer, the Secretary shall, if he deems it advisable to do so, direct that a copy of the order be served upon the parties as a tentative order; and, in such event, opportunity shall be given the parties to file exceptions thereto and written arguments or briefs in support of such exceptions. In such case, if exceptions are filed within a period of time (to be fixed by the Secretary but not to exceed 20 days) following the service of the tentative order, the Secretary shall give consideration to and shall make such changes in the tentative order as he deems to be appropriate; otherwise, the tentative order shall become final, as of the day following the date of expiration of the period fixed for the filing of exceptions.

§900.68 Applications for reopening hearings; for rehearings or rearguments of proceedings; or for reconsideration of order.

(a) *Petition requisite*—(1) *Filing; service.* An application for reopening the hearing to take further evidence, or for rehearing or reargument of the proceeding, or for reconsideration of the order shall be made by petition addressed to the Secretary and filed with the hearing clerk, who immediately shall notify and serve a copy thereof upon the other party to the proceeding. Every such petition shall state specifically the grounds relied upon.

(2) *Petitions to reopen hearings.* A petition to reopen the hearing for the purpose of taking additional evidence may be filed at any time prior to the issuance of the final

order. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

(3) *Petitions to rehear or reargue proceedings, or to reconsider orders.* A petition to rehear or reargue the proceeding or to reconsider the final order shall be filed within 15 days after the date of the service of such order. Every such petition shall state specifically the matters claimed to have been erroneously decided, and alleged errors must be briefly stated.

(b) *Procedure for disposition of petitions.* Within 10 days following the service of any petition provided for in this section, the other party to the proceeding shall file with the hearing clerk an answer thereto. As soon as practicable thereafter, the Secretary shall announce the decision granting or denying the petition. Unless the Secretary shall determine otherwise, the issuance or operation of the order shall not be stayed pending the decision of the Secretary upon the petition. In the event that any such petition is granted by the Secretary, the applicable rules of practice, as set out elsewhere in this subpart, shall be followed.

§900.69. Filing; service; extensions of time; effective date of filing; and computation of time.

(a) *Filing; number of copies.* Except as provided otherwise herein, all documents or papers required or authorized in this subpart to be filed with the hearing clerk shall be filed in quadruplicate: *Provided*, That, if there are more than two parties to the proceeding, a sufficient number of additional copies shall be filed so as to provide for service upon all the parties to the proceeding. Any document or paper, required or authorized in this subpart, to be filed with the hearing clerk, shall, during the course of an oral hearing, be filed with the presiding officer.

(b) *Service; proof of service.* Copies of all such papers shall be served upon the parties by the hearing clerk, by the presiding officer, or by some other employee of the De-

partment or by a United States Marshal or his deputy. Service shall be made either (1) by delivering a copy of the document or paper to the individual to be served or to a member of the partnership to be served or to the president, secretary, or other executive officer or any director of the corporation, organization, or association to be served, or to the attorney or agent of record of such individual, partnership, corporation, organization, or association; or (2) by leaving a copy of the document or paper at the principal office or place of business of such individual, partnership, corporation, organization, or association, or of his or its attorney or agent of record; or (3) by registering and mailing a copy of the document or paper, addressed to such individual, partnership, corporation, organization, or association, or to his or its attorney or agent of record, at his or its last known principal office, place of business, or residence. Proof of service hereunder shall be made by the affidavit of the person who actually made the service. The affidavit contemplated herein shall be filed with the hearing clerk, and the fact of filing thereof shall be noted on the docket of the proceeding.

(c) *Extensions of time.* The time for the filing of any documents or papers required or authorized in this subpart to be filed may be extended upon (1) a written stipulation between the parties, or (2) upon the request of a party, by the presiding officer before the transmittal of the record to the Secretary, or by the Secretary at any other time if, in the judgment of the Secretary or the presiding officer, as the case may be, there is good reason for the extension.

(d) *Effective date of filing.* Any document or paper, except a petition filed pursuant to §900.52, required or authorized under these rules to be filed shall be deemed to have been filed when it is postmarked, or when it is received by the hearing clerk. Any petition filed under §900.52 shall be deemed to be filed when it is received by the hearing clerk.

(e) *Computation of time.* Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided*, That, when

such time expires on a Sunday or legal holiday, such time shall be extended to include the next following business day.

§900.70. Applications for interim relief.

(a) *Filing the application.* A person who has filed a petition pursuant to §900.52 may by separate application filed with the hearing clerk apply to the Secretary or an order postponing the effective date of, or suspending the application of, the marketing order or any provision thereof, or any obligation imposed in connection therewith, pending final determination of the proceeding.

(b) *Contents of the application.* The application shall contain a statement of the facts upon which the relief is requested, including any facts showing irreparable injury. The application must be signed and sworn to by the petitioner and any facts alleged therein which are not within his personal knowledge shall be supported by affidavits of a person or persons having personal knowledge of such facts or by proper documentary evidence thereof.

(c) *Answer to application.* Immediately upon receipt of the application, the hearing clerk shall transmit a copy thereof, together with all supporting papers, to the Deputy Administrator, who shall, within 20 days, or such other time fixed by the Secretary, after the filing of the application file an answer thereto with the hearing clerk.

(d) *Contents of answer.* The answer shall contain a statement of the objections, if any, of the Deputy Administrator to the application for interim relief, and may be supported by affidavits and documentary evidence.

(e) *Transmittal to Secretary.* Upon receiving the answer of the Deputy Administrator or upon the expiration of the time for filing the answer, the hearing clerk shall transmit to the Secretary for his decision all papers filed in connection with the application.

(f) *Hearing and oral argument.* The Secretary may, in his discretion, permit oral argument or the taking of testimony in connection with such application. However, un-

less written request therefor is filed with the hearing clerk prior to the transmittal of the papers to the Secretary, the parties shall be deemed to have waived oral argument and the taking of testimony.

(g) *Decision by Secretary.* The Secretary may grant or deny the application. Any action taken by the Secretary shall be in the form of an order filed with the hearing clerk and shall contain a brief statement of the reasons for the action taken. The hearing clerk shall cause copies of the order to be served upon the parties.

§900.71. Hearing before Secretary.

The Secretary may act in the place and stead of a presiding officer in any proceeding hereunder. When he so acts the hearing clerk shall transmit the record to the Secretary at the expiration of the period provided for the filing of proposed findings of fact, conclusions and orders, and the Secretary shall thereupon, after due consideration of the record, issue his final order in the proceeding: *Provided*, That he may issue a tentative order in which event the parties shall be afforded an opportunity to file exceptions before the issuance of the final order.

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MILK MARKETING ORDER NO. 127, EFFECTIVE JANUARY 1, 1960, 24 F.R. 11071 ET SEQ., DECEMBER 31, 1959.

TITLE 7 — AGRICULTURE

Chapter IX — Agriculture Marketing Service (Marketing Agreements and Orders), Department of Agriculture

[Milk Order 127]

PART 1027 — MILK IN UPPER CHESAPEAKE BAY MARKETING AREA

Order Regulating Handling

AUTHORITY: §§1027.0 to 1027.101 issued under sec. 5, 49 Stat. 753, as amended; 7 U.S.C. 608c.

§1027.0. Findings and determinations.

(a) *Findings upon the basis of the hearing record.* Pursuant to the provisions of the Agricultural Marketing

Agreement Act of 1937, as amended (7 U.S.C. 601 et seq.), and the applicable rules of practice and procedure, governing the formulation of marketing agreements and marketing orders (7 CFR Part 900), a public hearing was held upon a proposed marketing agreement and a proposed order regulating the handling of milk in the Upper Chesapeake Bay, Maryland, marketing area. Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said order, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the said marketing area, and the minimum prices specified in the order are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk and be in the public interest;

(3) The said order regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held;

(4) All milk and milk products handled by handlers, as defined in this order, are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk and its products; and

(5) It is hereby found that the necessary expense of the market administrator for the maintenance and functioning of such agency will require the payment by each handler, as his pro rata share of such expense, 5 cents per hundredweight or such amount not to exceed 5 cents per hundredweight as the Secretary may prescribe, with respect to (i) receipts of producer milk (including such handler's own farm production), (ii) receipts of non-federally regulated other source milk at a pool plant allo-

cated to Class I, and (iii) receipts of Class I milk at a nonpool plant for which a payment is due pursuant to § 1027.62(d).

(b) *Additional findings.* (1) It is necessary in the public interest to make this order partially effective not later than January 1, 1960 and fully effective not later than February 1, 1960.

(2) The provisions of the said order are known to handlers. The recommended decision of the Deputy Administrator of the Agricultural Marketing Service was issued September 15, 1959 and the decision of the Assistant Secretary containing all the provisions of this order was issued November 20, 1959. This order will initiate a new regulatory program in this market. Therefore, it is necessary that the provisions other than those relating to prices and payments to producers and payments to the administrative and marketing service funds be placed in effect prior to the effective date of such pricing and payment provisions so that handlers may have opportunity to make necessary adjustments in their operations and accounting procedure to conform to all provisions of the order. In view of the foregoing, it is hereby found and determined that good cause exists for making this order partially effective January 1, 1960 and fully effective February 1, 1960, and that it would be contrary to the public interest to delay the effective date of this order for 30 days after its publication in the Federal Register. (See sec. 4(c), Administrative Procedure Act, 5 U.S.C. 1001 et seq.).

(c) *Determinations.* It is hereby determined that:

(1) The refusal or failure of handlers (excluding cooperative associations specified in section 8c(9) of the Act) of more than 50 percent of the milk, which is marketed within the marketing area, to sign a proposed marketing agreement, tends to prevent the effectuation of the declared policy of the Act;

(2) The issuance of this order is the only practical means pursuant to the declared policy of the Act of ad-

vancing the interests of producers as defined in the order; and

(3) The issuance of this order is approved or favored by at least two-thirds of the producers who participated in a referendum and who during the determined representative period were engaged in the production of milk for sale in the marketing area.

Order relative to handling. It is therefore ordered, that on and after the effective date hereof, the handling of milk in the Upper Chesapeake Bay, Maryland, marketing area shall be in conformity to, and in compliance with, the following terms and conditions:

DEFINITIONS

§ 1027.1 General definitions.

(a) "Act" means Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 et seq.

(b) "Department" means the United States Department of Agriculture.

(c) "Upper Chesapeake Bay marketing area", hereinafter referred to as the "marketing area" means all territory situated within the corporate limits of the city of Baltimore, the town of Laurel in Prince Georges County; the counties of Anne Arundel, Baltimore, Caroline, Carroll, Cecil, Dorchester, Harford, Howard, Kent, Queen Annes, Somerset, Talbot, Wicomico, Worcester and that portion of Calvert County lying north of a line beginning at the western terminus of Maryland State Highway 507; continuing easterly along said highway to its intersection with Maryland State Highway 2, continuing northerly along said Highway 2, to its intersection with Maryland State Highway 263 and then easterly along said Highway 263 to its terminus at the Chesapeake Bay, all in the State of Maryland, together with all waterfront facilities connected therewith and including all territory within such

boundaries occupied by Government (Federal, State or municipal) installations, institutions or other similar establishments.

(d) "Route" means a delivery (including any delivery by a vendor or disposition at a plant store or from a vending machine) of any Class I product to a wholesale or retail outlet, including a Federal, State or municipal establishment, but excluding any delivery to a plant.

§1027.2. Definitions of persons.

(a) "Person" means any individual, partnership, corporation, association, or other business unit.

(b) "Secretary" means the Secretary of Agriculture or any officer or employee of the United States authorized to exercise the powers and to perform the duties of the Secretary of Agriculture.

(c) "Dairy farmer" means any person who produces milk which is delivered in bulk (tank or cans) to a plant.

(d) "Dairy farmer for other markets" means:

(1) Any dairy farmer, whose milk is received at a pool plant during any month of September through February but whose milk is diverted to a nonpool plant during the month on more than the number of days specified in paragraph (e)(1) of this section, and

(2) Except for the months of March through August 1960, any dairy farmer whose milk is received at a pool plant during the months of March through August from a farm from which the handler, an affiliate of the handler, or any person who controls or is controlled by the handler, received milk other than as producer milk during any of the preceding months of September through February.

(e) "Producer" means any dairy farmer, except a producer handler or a dairy farmer for other markets, who produces milk which is received at a pool plant or is diverted to a nonpool plant during any month(s) of March through August or on not more than 8 days (4 days in the

case of every-other-day delivery) during any month(s) of September through February: *Provided*, That the milk so diverted shall be deemed to have been received by the diverting handler at a pool plant at the location from which it was diverted.

(f) "Cooperative association" means any cooperative marketing association of producers which the Secretary determines, after application by the association:

(1) To be qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act"; and

(2) To have full authority in the sale of milk of its members and to be engaged in making collective sales of or marketing milk or its products for its members.

(g) "Handler" means any person (1) in his capacity as the operator of a pool plant; (2) in his capacity as the operator of a nonpool plant from which (i) Class I milk is disposed of on routes in the marketing area; or (ii) milk is shipped to a pool plant qualified pursuant to §1027.3(b)(1); and (3) a cooperative association with respect to the milk of any producer which it causes to be diverted in accordance with the provisions of paragraph (e) of this section from a pool plant for the account of such cooperative association.

(h) "Pool handler" means any person in his capacity as the operator of a pool plant or a cooperative association qualified as a handler pursuant to paragraph (g)(3) of this section.

(i) "Producer-handler" means any person who operates a dairy farm and a plant from which Class I milk is disposed of on route(s) in the marketing area and who during the month received no milk from any source other than his own farm production and from pool plants: *Provided*, That the maintenance, care and management of the herd and other resources necessary to production, processing, packaging and distribution of the milk are the personal enterprise and personal risk of such person.

§1027.3. Definitions of plants.

(a) "Plant" means the land, buildings, surroundings, facilities and equipment operated by one or more persons, constituting a single operating unit or establishment for the receiving (other than transfer from one vehicle to another), processing or packaging of milk or milk products.

(b) "Pool plant" means a plant specified in subparagraphs (1), (2) or (3) of this paragraph other than that of a producer-handler: *Provided*, That any plant qualified as a pool plant pursuant to subparagraph (2) of this paragraph in each of the months of September through February shall be a pool plant for the immediately following months of March through August unless the handler gives written notice to the market administrator on or before the first day of any such month(s) that the plant is a nonpool plant for the remaining months through August: *And provided further*, That any such plant specified in subparagraph (2) of this paragraph which was a nonpool plant during any month of September through February shall not be a pool plant in any of the immediately following months of March through August in which it is operated by the same handler, an affiliate of the handler or by any person who controls or is controlled by the handler: *And provided also*, That notwithstanding the preceding proviso, any plant which furnishes proof to the market administrator that it met the 50 percent shipping requirement during each of the months of September 1959 to February 1960 inclusive, shall retain automatically its pool plant status during the period March through August 1960 unless the operator of such plant notifies the market administrator that such status should be terminated.

(1) A plant which during the month disposes of not less than 10 percent of its total receipts of milk directly from dairy farms on routes as Class I milk in the marketing area and not less than 50 percent of such receipts as Class I milk both inside and outside the marketing area.

(2) A plant in any month of September through February in which not less than 50 percent, and in any month of March through August in which not less than 40 per-

cent, of its receipts of milk from dairy farmers, is moved to a plant which disposes of not less than 10 percent of its receipts from dairy farms and from other plants on routes as Class I milk in the marketing area and not less than 50 percent of such receipts as Class I milk both inside and outside the marketing area: *Provided*, That in the case of a handler operating a pool plant qualified pursuant to subparagraph (1) of this paragraph and two or more plants approved by the appropriate health authority in the marketing area as a source of supply for such plant, such supply plants shall be considered as a unit (system) for purposes of plant qualification under this paragraph upon written notice to the market administrator by the handler designating the plants to be included and the period during which such designation shall apply. Such notice or notice of changes in designation shall be given on or before the first day of the first month to which such notice applies.

(3) A manufacturing plant, located in the marketing area, from which any fluid milk product is moved to a plant which is a pool plant pursuant to subparagraph (1) of this paragraph if during the month not less than 90 percent of its receipts from dairy farmers are from Baltimore City permit holders who are members of a cooperative association of which 70 percent or more of the members are producers whose milk is received at other pool plants.

(c) "Nonpool plant" means any milk manufacturing, processing or bottling plant other than a pool plant.

§1027.4. Definitions of milk and milk products.

(a) "Fluid milk product" means milk, skim milk, buttermilk, milk drinks (plain or flavored), concentrated milk, and (except eggnog, milk shake mix, ice cream mix, evaporated and plain or sweetened condensed milk or skim milk and sterilized products in hermetically sealed containers) any mixture in fluid form of cream and milk or skim milk containing less than 12 percent butterfat and 50 percent of the quantity by weight of any such mixture

containing at least 12 percent but less than 18 percent butterfat.

(b) "Producer milk" means all skim milk or butterfat contained in milk received at a pool plant directly from producers, or diverted in accordance with the provisions of §1027.2(e).

(c) "Other source milk" means all skim milk and butterfat contained in or represented by (1) receipts (including any Class II milk product produced in the handler's plant during a prior month) in a form other than as fluid milk products which are reprocessed, converted or combined with another product during the month, and (2) receipts from any source in the form of fluid milk products other than as producer milk or from pool plants and opening inventory.

(d) "Base milk" means milk received at a pool plant from a producer during any of the months of March through June which is not in excess of such producer's daily base computed pursuant to §1027.63 multiplied by the number of days in such month on which such producer's milk was received at such pool plant: *Provided*, That with respect to any producer on every-other-day delivery, the days of non-delivery shall be considered as days of delivery for purpose of this paragraph and of §1027.63.

(e) "Excess milk" means milk received at a pool plant from a producer during any of the months of March through June which is in excess of base milk received from such producer during such month.

Market Administrator

§1027.20. Designation.

The agency for the administration of this part shall be a "market administrator" selected by the Secretary. He shall be entitled to such compensation as may be determined by, and shall be subject to removal at the discretion of, the Secretary.

§1027.21. Powers.

The market administrator shall have the following powers with respect to this part:

(a) To administer its terms and provisions;

(b) To make rules and regulations to effectuate its terms and provisions;

(c) To receive, investigate, and report to the Secretary complaints of violations; and

(d) To recommend amendments to the Secretary.

§1027.22. Duties.

The market administrator shall perform all duties necessary to administer the terms and provisions of this part, including but not limited to the following:

(a) Within 45 days following the date on which he enters upon his duties, or such lesser period as may be prescribed by the Secretary, execute and deliver to the Secretary a bond, effective as of the date on which he enters upon his duties and conditioned upon the faithful performance of such duties, in an amount and with surety thereon satisfactory to the Secretary;

(b) Employ and fix the compensation of such persons as may be necessary to enable him to administer its terms and provisions;

(c) Obtain a bond in a reasonable amount and with reasonable surety thereon, covering each employee who handles funds entrusted to the market administrator;

(d) Pay out of the funds received pursuant to §1027.83,

(1) The cost of his bond and the bonds of his employees,

(2) His own compensation, and

(3) All other expenses, except those incurred under §1027.87, necessarily incurred by him in the maintenance and functioning of his office and in the performance of his duties;

(e) Keep such books and records as will clearly reflect the transactions provided for in this part, and, upon request by the Secretary surrender the same to such other person as the Secretary may designate;

(f) Publicly announce at his discretion, unless otherwise directed by the Secretary, by posting in a conspicuous place in his office and by such other means as he deems appropriate, the name of any person, who after the date upon which he is required to perform such acts, has not made reports pursuant to §1027.30 or payments pursuant to §§1027.80 through 1027.88;

(g) Submit his books and records to examination by the Secretary, and furnish such information and reports as the Secretary may request;

(h) Verify all reports and payments of each handler, by audit, if necessary, of such handler's records and of the records of any other handler or person upon whose utilization the classification of skim milk and butterfat for such handler depends;

(i) Prepare and make available for the benefit of producers, consumers, and handlers, such general statistics and information concerning the operation of this part as do not reveal confidential information;

(j) On or before the date specified, publicly announce by posting in a conspicuous place in his office and by such other means as he deems appropriate, the following:

(1) The 5th day of each month, the Class I price computed pursuant to §1027.50(a) for the current month, and the Class II price computed pursuant to §1027.50(b) and the handler butterfat differentials computed pursuant to §1027.51, both for the preceding month; and

(2) The 11th day of each month, the uniform price computed pursuant to §1027.71, or the base and excess prices computed pursuant to §1027.72 and the producer butterfat differential computed pursuant to §1027.81, all for the preceding month; and

(k) On or before the 11th day after the end of each month, report to each cooperative association which so requests, the class utilization of milk purchased from such association or delivered to the pool plant(s) of each handler by producers who are members of such cooperative association. For the purpose of this report, the milk so purchased or received shall be allocated to each class in the same ratio as all producer milk received by such handler during such month.

(l) On or before March 1, 1960, and on or before February 20th of each year thereafter notify:

(1) Each cooperative association of the daily base established by each producer member of such association;

(2) Each nonmember producer of the daily base established by such producer.

REPORTS, RECORDS AND FACILITIES

§1027.30. Reports of receipts and utilization.

(a) On or before the 7th day after the end of each month, or not later than the 8th day after the end of the month if the report required by this paragraph is delivered in person to the office of the market administrator, each cooperative association in its capacity as a handler and each handler with respect to each of his pool plants shall report for such month to the market administrator in the detail and on forms prescribed by the market administrator as follows:

(1) The quantities of skim milk and butterfat contained in: (i) receipts of producer milk (including such handler's own production), (ii) receipts of fluid milk products from other pool plants and (iii) receipts of other source milk;

(2) Inventories of fluid milk products on hand at the beginning and end of the month; and

(3) The utilization of all skim milk and butterfat required to be reported pursuant to this paragraph;

(b) Each handler operating a nonpool plant from which fluid milk products are disposed of on routes as Class I milk in the marketing area shall, unless otherwise directed by the market administrator, report for such plant at the same time and in the same manner prescribed for a pool handler in paragraph (a) of this section.

(c) Except as provided in paragraph (b) of this section each nonpool handler shall make reports to the market administrator at such time and in such manner as the market administrator may prescribe.

§1027.31. Other reports.

(a) Each pool handler shall report to the market administrator in the detail and on forms prescribed by the market administrator as follows:

(1) On or before the 20th day after the end of the month, for each of his pool plants, his producer payroll for such month, which shall show for each producer: (i) His name and address, (ii) the total pounds of milk received from such producer, (iii) the average butterfat content of such milk, and (iv) the net amount of the handler's payment, together with the price paid and the amount and nature of any deduction;

(2) On or before the first day other source milk is received at his pool plant(s) in the form of any fluid milk product, his intention to receive such product and on or before the last day such product is received, his intention to discontinue receipt of such product; and

(3) Such other information with respect to receipts and utilization of butterfat and skim milk as the market administrator shall prescribe.

(b) Promptly after a producer moves from one farm to another, or starts or resumes deliveries to any of a handler's pool plants, the handler shall file with the market administrator a report stating the producer's name and post office address, the date on which the change took place, and the farm and plant location involved.

(c) Each pool handler who receives milk during the month from producers for which payment is to be made to a cooperative association pursuant to §1027.80(b) shall on or before the 11th day after the end of each month report to such cooperative association concerning each producer-member of such cooperative association from whom he received milk during the month as follows:

(1) The name, address and code number, if any;

(2) The total deliveries and the number of days on which delivery was made;

(3) The average butterfat test of the milk delivered; and

(4) The nature and amount of any deductions to be made in payments due such producer.

(d) Each pool handler dumping skim milk pursuant to §1027.41(b)(3) shall give the market administrator during normal duty hours, not less than three hours advance notice of intention to make such disposition and of the quantities of skim milk involved.

§1027.32. Records and facilities.

Each handler shall maintain and make available to the market administrator during the usual hours of business such accounts and records of his operations together with such facilities as are necessary for the market administrator to verify or establish the correct data for each month, with respect to:

(a) The receipt and utilization of all skim and butterfat handled in any form;

(b) The weights and tests for butterfat and other content of all milk and milk products handled;

(c) The pounds of skim milk and butterfat contained in or represented by all items in inventory at the beginning and end of each month required to be reported pursuant to §1027.30(a)(2); and

(d) Payments to producers and cooperative associations, including any deductions, and the disbursement of money so deducted.

§1027.33. Retention of records.

All books and records required under this part to be made available to the market administrator shall be retained by the handler for a period of three years to begin at the end of the month to which such books and records pertain: *Provided*, That if, within such three-year period, the market administrator notifies the handler in writing that the retention of such books and records, is necessary in connection with a proceeding under section 8c(15)(A) of the Act or a court action specified in such notice, the handler shall retain such books and records, or specified books and records, until further notification from the market administrator. In either case, the market administrator shall give further written notification to the handler promptly upon the termination of the litigation or when the records are no longer necessary in connection therewith.

CLASSIFICATION OF MILK

§1027.40. Skim milk and butterfat to be classified.

All skim milk and butterfat received within the month at pool plants and which are required to be reported pursuant to §1027.30 shall be classified by the market administrator in accordance with the provisions of §§1027.41 through 1027.46.

§1027.41. Classes of utilization.

Subject to the conditions set forth in §§1027.42 to 1027.46 the classes of utilization shall be as follows:

(a) *Class I milk*. Class I milk shall be all skim milk (including that used to produce concentrated milk and reconstituted or fortified skim milk) and butterfat:

(1) Disposed of in the form of fluid milk products except as provided in paragraph (b) (2) and (3) of this section, and

(2) Not specifically accounted for as Class II milk.

(b) *Class II milk.* Class II milk shall be all skim milk and butterfat (1) used to produce any product other than those designated as Class I milk pursuant to paragraph (a)(1) of this section; (2) disposed of for livestock feed; (3) contained in the skim dumped if the conditions of §1027.31(d) are met by the handler; (4) contained in inventory of fluid milk products on hand at the end of the month; (5) in actual plant shrinkage not to exceed two percent of skim milk and butterfat, respectively, in producer milk; and (6) in shrinkage of other source milk.

§1027.42. Shrinkage.

The market administrator shall allocate shrinkage of each pool plant as follows:

(a) Compute the total shrinkage of skim milk and butterfat, respectively; and

(b) Allocate the resulting amounts pro rata to skim milk and butterfat, respectively, in receipts of producer milk and other source milk.

§1027.43. Responsibility of handlers and the reclassification of milk.

(a) All skim milk and butterfat shall be Class I milk unless the handler who first receives such skim milk or butterfat proves to the market administrator that such skim milk or butterfat should be classified otherwise; and

(b) Any skim milk or butterfat shall be reclassified if verification by the market administrator discloses that the original classification was incorrect.

§1027.44. Transfers.

Skim milk or butterfat disposed of during the month from a pool plant shall be classified:

(a) As Class I milk it transferred in the form of any fluid milk product to the pool plant of another handler unless utilization as Class II milk is claimed in the reports submitted for both pool plants for the month to the market administrator pursuant to §1027.30(a): *Provided*, That the skim milk or butterfat so classified as Class II milk shall be limited to the amount thereof remaining in Class II milk in the transferee plant after the allocation of other source milk pursuant to §1027.46 and any additional amounts of such skim milk or butterfat shall be classified as Class I milk: *And provided further*, That if either or both pool plants have receipts of other source milk, the skim milk or butterfat so transferred shall be classified at both plants so as to allocate the greatest possible Class I utilization to the producer milk at both plants.

(b) As Class I milk if transferred or diverted in the form of any fluid milk product to a producer-handler.

(c) As Class I milk is transferred in packaged form to a nonpool plant in the form of any fluid milk product.

(d) As Class I milk if transferred or diverted in bulk in the form of any fluid milk product to a nonpool plant (other than the plant of a producer-handler) to the extent of the disposition of skim milk and butterfat, respectively, from such plant on routes as Class I milk in the marketing area: *Provided*, That any remaining amount of such transfer or diversion shall be allocated to the highest utilization remaining in the transferee plant after the prior assignment of receipts at such plant from dairy farmers who the market administrator determines constitutes its regular source of supply.

(e) Except as provided in paragraph (d) of this section as Class I milk if transferred or diverted in bulk in the form of any fluid milk product to a non-pool plant, located less than 300 miles from the City Hall in Baltimore, Maryland, unless (1) the handler claims Class II utilization in his report submitted pursuant to §1027.30(a); (2) the operator of the transferee plant maintains books and records showing the utilization of all skim milk and butterfat at

such plant which are made available if requested by the market administrator for the purpose of verification; and (3) an equivalent Class II utilization was available in such plant after the assignment of receipts at such plant from other Federal order plants in the class to which assigned under such other order(s): *Provided*, That if upon inspection of the records of such plant it is found that an equivalent utilization of skim milk and butterfat was not available the remaining pounds shall be classified as Class I.

(f) As Class I milk if transferred or diverted in bulk in the form of any fluid milk products to a nonpool plant located more than 300 miles from the City Hall in Baltimore, Maryland.

§1027.45. Computation of skim milk and butterfat in each class.

For each month, the market administrator shall correct for mathematical and for other obvious errors the reports of receipts and utilization submitted pursuant to §1027.30(a) for each pool plant of each handler and shall compute the pounds of skim milk and butterfat in Class I milk and Class II milk for such handlers: *Provided*, That if any of the water contained in the milk from which a product is made is removed before the product is utilized or disposed of by a handler, the pounds of skim milk disposed of in such product shall be considered to be a quantity equivalent to the nonfat milk solids contained in such product plus all of the water originally associated with such solids.

§1027.46 Allocation of skim milk and butterfat classified.

After making the computations pursuant to §1027.45, the market administrator shall determine the classification of producer milk received at each pool plant as follows:

(a) Skim milk shall be allocated in the following manner:

(1) Subtract from the total pounds of skim milk in Class II milk the pounds of skim milk in producer milk classified pursuant to §1027.41(b)(5);

(2) Subtract from the remaining pounds of skim milk in each class, in series beginning with Class II milk, the pounds of skim milk in other source milk received during the month in a form other than fluid milk products;

(3) Subtract from the remaining pounds of skim milk in each class, in series beginning with Class II milk, the pounds of skim milk in other source milk received in the form of any fluid milk product from plants which are not fully subject to the pricing provisions of another order issued pursuant to the Act;

(4) Subtract from the remaining pounds of skim milk in each class, in series beginning with Class II milk, the pounds of skim milk in other source milk in bulk receipts in the form of any fluid milk product from plants which are fully subject to the pricing provisions of another order issued pursuant to the Act;

(5) Subtract from the pounds of skim milk remaining in Class II milk in excess of the pounds of skim milk in inventory of fluid milk products on hand at the end of the month, the pounds of skim milk in inventory of such products on hand at the beginning of the month: *Provided*, That if the pounds of skim milk in such beginning inventory is greater than the remaining Class II milk utilization the difference shall be subtracted from the pounds of skim milk remaining in Class I milk;

(6) Subtract from the remaining pounds of skim milk in Class I milk the pounds of skim milk in packaged fluid milk products received from fully regulated plants under the provisions of another order issued pursuant to the Act;

(7) Subtract from the remaining pounds of skim milk in each class the pounds of skim milk received from the pool plants of other handlers in the form of fluid milk products

according to the classification determined pursuant to §1027.44(a);

(8) Add to the remaining pounds of skim milk in Class II the pounds of skim milk subtracted pursuant to subparagraph (1) of this paragraph; and

(9) If the remaining pounds of skim milk in both classes exceed the pounds of skim milk contained in producer milk, subtract such excess from the remaining pounds of skim milk in each class in series beginning with Class II milk. Any amount so subtracted shall be known as "overage";

(b) Butterfat shall be allocated in accordance with the same procedure outlined for skim milk in paragraph (a) of this section; and

(c) Add the pounds of skim milk and the pounds of butterfat allocated to producer milk in each class computed pursuant to paragraphs (a) and (b) of this section and determine the weighted average butterfat content of each class.

Minimum Prices

§1027.50. Class prices.

Subject to the provisions of §§1027.51 and 1027.52 each handler shall pay, at the time and in the manner set forth in §1027.80 for each hundredweight of milk containing 3.5 percent butterfat received at his pool plant(s) during the month from producers or a cooperative association not less than the following prices per hundredweight for the respective quantities of milk in each class computed pursuant to §1027.46.

(a) *Class I price.* During the first 18 months from the effective date of this part the price for Class I milk shall be $5.55 for the months of July through February and $5.10

for the months of March through June: *Provided*, That such price in any month shall be adjusted to reflect the deviation of the average of the Federal order Class I prices for the Philadelphia, New York and Chicago markets for such month from such average price in the corresponding month of 1958, as follows:

Three-market average deviation from corresponding month of 1958 (cents), plus or minus:	*Class I price adjustment (cents) plus or minus*
0-5	0
15.1-35	20
35.1-55	40
55.1-75	60
75.1-95	80

(b) *Class II price.* The price for Class II milk shall be the sum of the values of butterfat and skim milk computed as follows:

(1) *Butterfat.* Add all weekly quotations per 40-quart can of 40 percent sweet cream approved for Pennsylvania and New Jersey in the Philadelphia market as reported each week ending within the month by the Department, divide the number of quotations, subtract $2.00, divide by 33.45, multiply by 3.5: *Provided*, That such butterfat value shall not be less than 3.5 times 120 percent of the average Grade A (92-score) butter price at New York as reported by the Department for the month for which payment is to be made less 17 cents.

(2) *Skim milk.* The average of carlot prices per pound for nonfat dry milk, spray and roller process, respectively, for human consumption, f.o.b. manufacturing plants in the Chicago area, as reported for the period from the 26th day of the preceding month through the 25th day of the current month by the Department shall determine the skim values as follows:

Average price per pound of nonfat dry milk (spray and roller process):	Skim value
$0.0065 or below	
$0.066-$0.075	$0.075
$0.076-$0.085	.150
$0.086-$0.095	.225
$0.096-$0.105	.300
$0.106-$0.115	.375
$0.116-$0.125	.450
$0.126-$0.135	.525
$0.136-$0.145	.600
$0.146-$0.155	.675
$0.156-$0.165	.750
$0.166-$0.175	.825
$0.176-$0.185	.900
$0.186-$0.195	.975

§1027.51. Butterfat differentials to handlers.

For milk containing more or less than 3.5 percent butterfat, the class prices pursuant to §1027.50 shall be increased or decreased, respectively, for each one-tenth of one percent butterfat content variation from 3.5 percent, by the appropriate rate, rounded to the nearest one-tenth cent, determined as follows:

(a) *Class I milk.* Add all weekly quotations per 40-quart can of 40 percent fresh sweet cream, approved for Pennsylvania and New Jersey, in the Philadelphia market as reported each week ending within the month by the Department, divide by the number of quotations and divide the resulting amount by 334.8: *Provided*, That if the result is less than the Class II differential determined pursuant to paragraph (b) in this section, such Class II differential shall also be applicable to Class I milk; and

(b) *Class II milk.* Divide by 35 the butterfat value determined pursuant to §1027.50(b)(1).

§1027.52. Location differentials to handlers.

For that milk received from producers at a pool plant located 75 miles or more from the nearer of the City Hall in Baltimore or the Courthouse in Salisbury, Maryland, by the shortest hard-surfaced highway distance as determined by the market administrator, and which is assigned to Class I milk, the price specified in §1027.50(a) shall be reduced 12 cents per hundredweight plus an additional 1.5 cents for each additional 10 miles or fraction thereof in excess of 75 miles: *Provided*, That for the purpose of calculating such location differential products designated as Class I milk which are transferred between pool plants shall be assigned first to any remainder of Class II milk in the transferee plant after making the allocations prescribed in §1027.46(a)(1) through (5) and the corresponding steps in §1027.46(b) for such plant, such assignment to the transferor plant to be made in sequence beginning with the plant where the largest location differential is applicable.

§1027.53. Use of equivalent price or index.

If for any reason a price quotation or index required by this part for computing class prices or for any other purpose is not available in the manner described, the market administrator shall use a price determined by the Secretary to be equivalent to the price or index which is required.

APPLICATION OF PROVISIONS

§1027.60. Producer-handler.

Sections 1027.40 through 1027.46, 1027.50 through 1027.52, 1027.62 through 1027.64, 1027.70 through 1027.72, 1027.80 through 1027.89 shall not apply to a producer-handler.

§1027.61. Plants subject to other Federal orders.

A plant specified in paragraph (a) or (b) of this section shall be considered as a nonpool plant, except that the operator of such plant shall, with respect to the total receipts and utilization or disposition of skim milk and butter-

fat at the plant, make reports to the market administrator at such time and in such manner as the market administrator may require and allow verification of such reports by the market administrator.

(a) Any plant qualified pursuant to §1027.3(b)(1) which would otherwise be subject to the classification and pricing provisions of another order issued pursuant to the Act unless a greater volume of Class I milk is disposed of from such plant on routes in this marketing area than in a marketing area pursuant to such other order.

(b) Any plant qualified pursuant to §1027.3(b)(2) which would otherwise be subject to the classification and pricing provisions of another order issued pursuant to the Act unless such plant qualified as a pool plant pursuant to the first proviso in §1027.3(b) for each month during the preceding September through February.

§1027.62. Payments on other source milk.

On or before the 13th day after the end of each month, handlers shall make payments to producers through the producer-settlement fund as follows:

(a) Each pool handler who received other source milk which is allocated to Class I pursuant to §1027.46(a)(2) and (b) shall make payment on the quantity so allocated at the difference between the Class II price and the Class I price applicable at the location of his pool plant qualified pursuant to §1027.3(b)(1).

(b) Each pool handler who received other source milk which is allocated to Class I pursuant to §1027.46(a)(3) and (b) shall make payment on the quantity so allocated at the difference between the Class I price and the Class II price applicable at the location of the nearest nonpool plant(s) (as determined by the application of the location differential rate pursuant to §1027.52) from which an equivalent amount of such other source milk was received.

(c) Each pool handler who received other source milk which is allocated to Class I pursuant to §1027.46(a)(4)

or (6) and (b), which milk was not classified and priced as Class I milk under such other Federal order, shall make payment on the quantity of such milk at the difference between the Class I price and the Class II price applicable at the location of the nearest other Federal order plant(s) (as determined by the application of the location differential rate presented in §1027.52) from which an equivalent amount of such other source milk was received.

(d) Each handler operating a nonpool plant which is not subject to the classification and pricing provisions of another order issued pursuant to the Act, and from which Class I milk is disposed of on routes in the marketing area during the month, shall make payment on the quantity of skim milk and butterfat so disposed of which is in excess of his receipts of skim milk and butterfat, respectively, classified and priced as Class I milk under this or any other Federal order at the difference between the Class I price and the Class II price applicable at the location of such plant.

(e) Each handler operating a nonpool plant which is subject to the classification and pricing provisions of another order issued pursuant to the Act, and from which Class I milk is disposed of on routes in the marketing area during the month shall make payment on any quantity of skim milk and butterfat so disposed of which was not classified and priced as Class I under such other order, at the difference between the Class I and Class II price applicable at the location of such plant.

§1027.63 Computation of base for each producer.

For each of the months of March through June of each year the market administrator shall compute a base for each producer as follows, subject to the rules set forth in §1027.64.

(a) Divide the total pounds of milk received by a pool handler(s) from such producer during the months of July through December immediately preceding by the num-

ber of days of such producer's delivery in such period, but not less than 154 days: *Provided*, That for purposes of determining bases to be effective during the March-June period 1960, records of receipts at plants and records of the cooperative associations satisfactory to the market administrator, shall be used for the period July 1 through December 1959: *And provided further*, That in the case of a producer on every-other-day delivery, the days of nondelivery shall be considered days of delivery for purposes of this section.

1027.64 Base rules.

The following rules shall apply in connection with the establishment of bases:

(a) A base computed pursuant to 1027.63 may be transferred in its entirety upon written notice to the market administrator on or before the last day of the month of transfer, but only if a producer sells, leases or otherwise conveys his herd to another producer and if it is established to the satisfaction of the market administrator that the conveyance of the herd was bona fide and not for the purpose of evading any provision of this part.

(b) If a producer operates more than one farm, each delivering milk to a pool plant, he shall establish a separate base with respect to producer milk delivered from each such farm.

(c) Only one base shall be allotted with respect to milk produced by one or more persons where the herd, land, buildings, and equipment used are jointly owned or operated: *Provided*, That if a base is held jointly, the entire base shall be transferable only upon the receipt of an application signed by all joint holders or their heirs, or assigns.

1027.70 Computation of the value of producer milk for each handler.

For each month the market administrator shall compute the value of producer milk for each pool handler as follows:

(a) Multiply the pounds of producer milk in each class computed pursuant to §1027.46 by the applicable class price and total the resulting amounts.

(b) Add the amount of any payments due from such handler pursuant to §1027.62(a), (b) and (c).

(c) Add the amounts computed by multiplying the pounds of "overage" deducted from each class pursuant to §1027.46(a)(9) and (b) by the applicable class price.

(d) Add the amount computed by multiplying the difference between the appropriate Class II price for the preceding month and the appropriate Class I price for the current month by the hundredweight of producer milk classified in Class II during the preceding month less allowable shrinkage allocated pursuant to §1027.46(a)(1) and (b) in such month, or the hundredweight of milk subtracted from Class I pursuant to §1027.46(a)(5) and (b) for the current month, whichever is less;

(e) Add the amount computed by multiplying the difference between the appropriate Class II price for the preceding month and the appropriate Class I price for the current month by the hundredweight of milk allocated to Class I pursuant to §1027.46(a)(5) and (b) for the current month which is in excess of (1) the hundredweight of milk for which an adjustment was made pursuant to paragraph (d); and (2) the hundredweight of milk assigned to Class II pursuant to §1027.46(a)(4) and (b) for the previous month and which was classified and priced as Class I under the other Federal order; and

(f) Add or subtract, as the case may be, an amount necessary to correct errors discovered by the market administrator in the verification of reports of such handler of his receipts and utilization of skim milk and butterfat for previous months.

§1027.71 Computation of the uniform price.

For each of the months of July through February, the market administrator shall compute the uniform price

per hundredweight of producer milk of 3.5 percent butterfat content f.o.b. market as follows:

(a) Combine into one total the net obligations computed pursuant to §1027.70 for all handlers who made reports prescribed in §1027.30(a) for the month who were not in default of payments pursuant to §1027.84 for the preceding month;

(b) Subtract, if the weighted average butterfat content of producer milk in paragraph (a) is greater than 3.5 percent, or add, if such average butterfat content is less than 3.5 percent an amount computed by multiplying the amount by which the average butterfat content of such milk varies from 3.5 percent by the producer butterfat differential computed pursuant to §1027.81 and multiply the resulting figure by the total hundredweight of such milk;

(c) Add an amount equal to the sum of deductions to be made from producer payments for location differentials pursuant to §1027.82;

(d) Add an amount equal to not less than one-half of the unobligated balance on hand in the producer-settlement fund;

(e) Divide the resulting amount by the total hundredweight of producer milk included under paragraph (a) in this section; and

(f) Subtract not less than 4 cents nor more than 5 cents from the amount computed pursuant to paragraph (e) of this section.

§1027.72 Price for base milk and excess milk.

For each of the months of March through June the price for base milk and excess milk of 3.5 percent butterfat content f.o.b. market shall be as follows:

(a) The price for excess milk shall be the Class II price computed pursuant to §1027.50(b); and

(b) The price for base milk shall be the price computed by the market administrator as follows:

(1) Make the same computations as required pursuant to §1027.71(a) through (d);

(2) Subtract from the resulting value an amount computed by multiplying the total hundredweight of excess milk by the excess price pursuant to paragraph (a) in this section;

(3) Divide the value obtained pursuant to subparagraph (2) in this paragraph by the total hundredweight of base milk; and

(4) Subtract from the resulting amount not less than 4 cents nor more than 5 cents.

PAYMENTS

§1027.80. Time and method of payment.

(a) Except as provided in paragraph (b) of this section each pool handler on or before the 15th day after the end of each month shall make payment to each producer for milk which was received from such producer during the month at not less than the uniform price computed pursuant to §1027.71 for the months of July through February and at not less than the price for base milk computed pursuant to §1027.72(b) with respect to base milk received from such producer, and not less than the excess price determined pursuant to §1027.72(a) for excess milk received from such producer for the months of March through June subject to the following adjustments: (1) The butterfat differential computed pursuant to §1027.81, (2) less the location differential computed pursuant to §1027.82, and (3) less proper deductions authorized in writing by such producer: *Provided*, That if by such date such handler has not received full payment from the market administrator pursuant to §1027.85 for such month, he may reduce pro rata his payments to producers by not more than the amount of such underpayment. Payment to producers shall be completed thereafter not later than the date for making payments pursuant to this paragraph next

following after receipt of the balance due from the market administrator;

(b) In the case of a cooperative association which the market administrator determines is authorized by its producer-members to collect payment for their milk and which has so requested any handler in writing, such handler shall on or before the day prior to the date on which payments are due individual producers, pay the cooperative association for milk received during the month from the producer-members of such association as determined by the market administrator, an amount not less than the total due such producer-members as determined pursuant to paragraph (a) of this section;

(c) In the case of milk received by a handler from a cooperative association in its capacity as a handler such handler shall on or before the day prior to the date on which payments are due individual producers, pay to such cooperative association for milk so received during the month, an amount not less than the value of such milk computed at the applicable class prices for the location of the plant of the buying handler.

§1027.81. Producer butterfat differential.

In making payments pursuant to §1027.80 (a) or (b), the uniform prices and the price for base and for excess milk shall be adjusted for each one-tenth of one percent of butterfat content in the milk of each producer above or below 3.5 percent, as the case may be, by a butterfat differential equal to the average of the butterfat differentials determined pursuant to §1027.51 (a) and (b) weighed by the pounds of butterfat in producer milk in each class and rounded to the nearest full cent.

§1027.82. Location differential to producers.

In making payments to producers or to a cooperative association pursuant to §1027.80 (a) and in making payment for base milk pursuant to §1027.80 (b) a handler shall deduct with respect to all such milk received at pool plants located 75 miles by shortest highway distance from the

nearer of the City Hall, Baltimore, Maryland, or the Courthouse, Salisbury, Maryland, as determined by the market administrator, 12 cents per hundredweight plus 1.5 cents for each additional 10-mile distance, or fraction thereof, which such plant is located from such point.

§1027.83. Producer-settlement fund.

The market administrator shall establish and maintain a separate fund known as the "producer-settlement fund" into which he shall deposit all payments made by handlers pursuant to §§1027.62, 1027.84 and 1027.86 and out of which he shall make all payments pursuant to §§1027.85 and 1027.86; *Provided*, That the market administrator shall offset any such payment due to any handler against payment due from such handler.

§1027.85. Payment out of the producer-settlement fund.

On or before the 13th day after the end of each month, each handler, including a cooperative association which is a handler, shall pay to the market administrator for payment to producers through the producer-settlement fund the amount by which the net pool obligation of such handler is greater than the sum required to be paid producers by such handler pursuant to §1027.80 (a) and (b).

§1027.85. Payment out of the producer-settlement fund.

On or before the 13th day after the end of the month, the market administrator shall pay to each handler for payment to producers the amount by which the sum required to be paid producers by such handler pursuant to §1027.80 (a) and (b) is greater than the net pool obligations of such handler: *Provided*, That if the balance in the producer-settlement fund is insufficient to make all payments pursuant to this section, the market administrator shall reduce uniformly such payments and shall complete such payments as soon as the necessary funds are available.

§1027.86. Adjustment of accounts.

Whenever verification by the market administrator of reports or payments of any handler discloses errors re-

sulting in money due (a) the market administrator from such handler, (b) such handler from the market administrator, or (c) any producer or cooperative association from such handler, the market administrator shall promptly notify such handler of any amount so due and payment thereof shall be m de on or before the next date for making payments set forth in the provisions under which such error occurred.

§1027.87. Marketing services.

(a). Except as set forth in paragraph (b) of this section; each handler, in making payments directly to producers for milk (other than milk of his own production) pursuant to §1027.80(a) shall deduct 5 cents per hundredweight or such lesser amount as the Secretary may prescribe and shall pay such deductions to the market administrator on or before the 18th day after the end of the month. Such money shall be expended by the market administrator to provide marke information and to verify the weights, samples and tests of milk of producers who are not receiving such service from a cooperative association; and

(b) In the case of producers for whom the Secretary determines a cooperative association is actually performing the services set forth in paragraph (a) of this section, each handler shall make, in lieu of the deduction specified in paragraph (a) of this section, such deductions from the payments to be made directly to such producers pursuant to §1027.80(a) as are authorized by such producers on or before the 18th day after the end of each month and pay such deductions to the cooperative rendering such services.

§1027.88. Expense of administration.

As his pro rata share of the expense of administration of this part, each handler, including any cooperative association which is a handler, shall pay to the market administrator on or before the 18th day after the end of the month, 5 cents per hundredweight or such lesser amount as the Secretary may prescribe for each hundredweight of skim milk and butterfat contained in (a) producer milk

(including such handler's own farm production), (b) other source milk at a pool plant which is allocated to Class I milk pursuant to §1027.46(a) (2), (3) and (b), or (c) Class I milk for which a payment is due pursuant to §1027.62(d).

§1027.89. Termination of obligations.

The provisions of this section shall apply to any obligation under this part for the payment of money.

(a) The obligation of any handler to pay money required to be paid under the terms of this part shall, except as provided in paragraphs (a) and (c), terminate two years after the last day of the month during which the market administrator receives the handler's utilization report on the milk involved in such obligation, unless within such two-year period the market administrator notifies the handler in writing that such money is due and payable. Service of such notice shall be complete upon mailing to the handler's last known address, and it shall contain but need not be limited to, the following information:

(1) The amount of the obligation;

(2) The month(s) during which the milk, with respect to which the obligation exists, was received or handled; and

(3) If the obligation is payable to one or more producers or to an association of producers, the name of such producer(s) or association of producers, or if the obligation is payable to the market administrator, the account for which it is to be paid;

(b) If a handler fails or refuses, with respect to any obligation under this part, to make available to the market administrator or his representatives all books and records required by this part to be made available, the market administrator may, within the two-year period provided for in paragraph (a) of this section, notify the handler in writing of such failure or refusal. If the market administrator so notifies a handler, the said two-year period with respect to such obligation shall not begin until

the first day of the month following the month during which all such books and records pertaining to such obligations are made available to the market administrator or his representatives;

(c) Notwithstanding the provisions of paragraphs (a) and (b) of this section, a handler's obligation under this part to pay money shall not be terminated with respect to any transaction involving fraud or willful concealment of a fact, material to the obligation on the part of the handler against whom the obligation is sought to be imposed; and

(d) Any obligation on the part of the market administrator to pay a handler any money which such handler claims to be due him under the terms of this part shall terminate two years after the end of the month during which the milk involved in the claim was received if an underpayment is claimed, or two years after the end of the month during which the payment (including deduction or set off by the market administrator) was made by the handler if a refund on such payment is claimed, unless such handler, within the applicable period of time files, pursuant to section 8c(15)(A) of the Act, a petition claiming such money.

EFFECTIVE TIME, SUSPENSION, OR TERMINATION.

§1027.90. Effective time.

The provisions of this part, or any amendment to this part, shall become effective at such time as the Secretary may declare and shall continue in force until suspended or terminated, pursuant to §1027.91.

§1027.91. Suspension or termination.

The Secretary may suspend or terminate this part or any provision of this part, whenever he finds that this part or any provision of this part, obstructs, or does not tend to effectuate the declared policy of the Act. This part shall terminate, in any event, whenever the provisions of the Act authorizing it cease to be in effect.

§1027.92. Continuing obligations.

If under the suspension or termination of any or all provisions of this part there are any obligations thereunder, the final accrual or ascertainment of which requires further acts by any person (including the market administrator), such further acts shall be performed notwithstanding such suspension or termination.

§1027.93. Liquidation.

Upon the suspension or termination of the provisions of this part, except this section, the market administrator, or such liquidating agent as the Secretary may designate, shall, if so directed by the Secretary, liquidate the business of the market administrator's office, dispose of all property in his possession or control, including accounts receivable, and execute and deliver all assignments or other instruments necessary or appropriate to effectuate any such disposition. If the liquidating agent is so designated, all assets, books and records of the market administrator shall be transferred promptly to such liquidating agent. If, upon such liquidation, the funds on hand exceed the amounts required to pay outstanding obligations of the office of the market administrator and to pay necessary expenses of liquidation and distribution, such excess shall be distributed to contributing handlers and producers in an equitable manner.

MISCELLANEOUS PROVISIONS.

§1027.100. Agents.

The Secretary may by designation in writing name any officer or employee of the United States to act as his agent or representative in connection with any of the provisions of this part.

§1027.101. Separability of provisions.

If any provision of this part, or its application to any person or circumstances, is held invalid, the application of such provision and of the remaining provisions of this

part, to other persons or circumstances shall not be affected thereby.

Issued at Washington, D.C., this 28th day of December 1959, to be effective as follows:

Sections 1027.0 through 1027.22(f), §§1027.30 through 1027.46, §1027.60 and §§1027.90 through 1027.101 shall be effective on and after January 1, 1960 and all of the remaining provisions shall be effective on and after February 1, 1960.

CLARENCE L. MILLER,

Assistant Secretary.

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No. 202

In the Supreme Court of the United States

OCTOBER TERM, 1953

HOWETH M. MILLS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (R. 205)[1] is reported at 206 F. Supp. 239.[2] The opinion of the United States

[1] "R." refers to the separately bound printed appendix to the Government's (appellant's) brief filed in the court of appeals, nine copies of which petitioner has filed in this Court. "Pet. App." references are to the appendix to the petition for a writ of certiorari.

[2] The opinion of the district court rendered upon the Government's separate action to enforce the marketing order, pursuant to 7 U.S.C. 608a(6) (R. 96), is reported at 185 F. Supp. 709. The opinion of the district court rendered upon denial of petitioners' application for a stay of enforcement of the foregoing judgment (R. 107) is reported at 187 F. Supp. 314.

Court of Appeals for the Fourth Circuit (Pet. App. 1a) is reported at 315 F. 2d 828. The opinion of the court of appeals rendered upon denial of petitioners' application for a stay of its mandate (Pet. App. 21a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1963 (Pet. App. 1a). The petition for a writ of certiorari was filed on June 10, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture erred in refusing to admit additional evidence in an administrative proceeding to review the validity of a milk marketing order promulgated after a full evidentiary hearing in which petitioners participated.

2. Whether the Secretary was acting within his discretion in including the Maryland counties on the "Eastern Shore" of Chesapeake Bay within the ambit of the marketing order.

3. Whether the Secretary's findings of fact met the requirements of the Agricultural Marketing Agreement Act of 1937.

STATUTE INVOLVED

The pertinent sections of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601, *et seq.*, are set forth in the Appendix, *infra*, pp. 36–50.

STATEMENT

1. INTRODUCTION

Petitioners seek to have the Court review a decision of the Fourth Circuit upholding the validity of Federal Milk Marketing Order No. 16. On June 17, 1963, the Court denied a petition for a writ of certiorari filed by another party seeking review of that same decision, *Willow Farms Dairy, Inc., et al.* v. *Freeman*, No. 1121, October Term, 1962.[3] Petitioners here base their challenge on different grounds.

The instant litigation involves concurrent actions under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601, *et seq.* One is an enforcement action brought by the United States under 7 U.S.C. 608a(6) to obtain the compliance of petitioners Howeth M. Mills and Crawford Mills, co-partners of the Mills Dairy Products Company, with Federal Milk Marketing Order No. 16 (originally numbered 127) issued by the Secretary of Agriculture. The other was brought by these petitioners against the Secretary, seeking judicial review of the Milk Marketing Order and challenging its validity.

2. THE MARKETING ORDER

Under the Agricultural Marketing Agreement Act, the Secretary of Agriculture is authorized, under certain conditions, to establish "marketing areas" and

[3] The court of appeals, in a single opinion, disposed of a number of appeals involving challenges by several parties to the validity of this marketing order. Before certiorari was denied in *Willow Farms*, the Solicitor General advised the Court by letter dated June 12, 1963, of the pendency of the *Mills* petition, but urged that the issues were distinguishable.

to regulate companies marketing certain agricultural commodities, including milk, in those areas. Before the Secretary may issue an order establishing a marketing area, the Act requires that "he shall give due notice of and an opportunity for a hearing upon a proposed order." 7 U.S.C. 608c(3). If he finds "upon the evidence introduced at such hearing" that the proposed order will tend to effectuate the policy of the Act, he may then issue the marketing order. 7 U.S.C. 608c(4).

In this case, the Secretary gave due notice of public hearings, at which he intended to consider a proposal for a milk marketing order covering the City of Baltimore and Maryland counties surrounding upper Chesapeake Bay, including counties on the "Eastern Shore" of the Bay. Petitioners, among others, had notice of the hearings and participated in the proceedings (R. 108).

On the basis of the evidence introduced at the public hearings, the Secretary issued his "Decision on Proposed Marketing Agreement and Order," 24 F.R. 9441, *et seq.* (R. 1–49). He found, *inter alia* (R. 48), that the "proposed marketing agreement and order and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act." He further found that the minimum prices to be paid to dairy farmers for milk, which the order established, would reflect "the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area" and would "insure a sufficient quantity of

pure and wholesome milk, and be in the public interest."

In accordance with that decision, the Secretary promulgated Milk Marketing Order No. 127, now No. 16, on December 31, 1959, 24 F.R. 11071, *et seq.* (R. 50-81). The order regulates the marketing of milk in a region centered on Baltimore, Maryland, and encompasses that city, together with surrounding Maryland counties on the western and eastern shores of Chesapeake Bay, *viz.*, "The Upper Chesapeake Bay Milk Marketing Area."

The provisions of this marketing order (in common with approximately 70 similar Federal Marketing Orders) operate directly upon the companies engaged in the business of selling and distributing milk and its products in the area. Under the Order, these regulated milk companies[1] are each required to pay not less than certain uniform minimum prices established by the Secretary for milk which they purchase from their dairy farmer suppliers. The applicable minimum price depends upon the use made by the milk company of the milk it purchases, milk to be used in fluid form (Class I) being priced higher than milk

[1] The Agricultural Marketing Agreement Act governs the regulation by the Secretary of Agriculture of many diverse agricultural commodities. The Act refers to those who raise these commodities as "producers" and to those who distribute and market them as "handlers." As this case involves only the regulation of milk marketing, we shall refer here to the principals by their common descriptions, "farmers" and "milk companies."

[2] The Act also permits additional price differentials based upon such factors as the butterfat content of the milk, transportation factors, etc., 7 U.S.C. 608c(5)(A). None of these differentials are involved in these proceedings, however.

for manufacturing into such items as butter and cheese (Class II). Milk that must be disposed of for manufacturing purposes is known as "surplus" and has traditionally commanded lower prices on the open market.[6]

The marketing order does not require the milk companies to pay those minimum class prices directly to the dairy farmers. Rather, as authorized by Section 8c(5) of the Act,[7] it contains provisions to insure that the rate of return to each dairy farmer for his milk is the same, regardless of the use made of it by the company to which he delivers the milk. The order accomplishes this objective by means of a market-wide "pool." Monthly, each regulated milk com-

[6] In order to insure that it will at all times be able to meet the fluctuating daily consumer demand for fluid milk, the industry must carry a "surplus" of 20% over the average demand; however, because the herds naturally produce significantly more milk in the spring, to meet the needs in November necessitates more than 50% surplus in June. "Surplus" milk is not wasted: it is manufactured into butter, cheese, powdered milk and similar items. However, these manufactured items are in direct competition with similar products made across the nation, often in areas with lower production costs and from milk of lower quality. Consequently, "surplus" milk can be sold only at a greatly reduced price. The cut-throat competition among the farmers for the more profitable fluid milk outlets led to violence and business practices which jeopardized the vital fluid milk supply. The Agricultural Marketing Agreement Act was enacted to control the situation. This Court has in many cases considered the problems of the milk industry outlined above. See, *Nebbia* v. *New York*, 291 U.S. 502, 515-522; *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 548-550; *H. P. Hood & Sons* v. *United States*, 307 U.S. 588; *Stark* v. *Wickard*, 321 U.S. 288; *United States* v. *Ruzicka*, 329 U.S. 287; *H. P. Hood & Sons* v. *Du Mond*, 336 U.S. 525.

[7] 7 U.S.C. 608c(5).

pany reports its total sales of milk in each price class to a Market Administrator. That official totals the value of all the reported sales and divides that sum by the quantity of milk sold. The result is, of course, a weighted average between the Class I and the lower Class II price. This monthly average price, known as the uniform or "blend" price, is the minimum price required to be paid by the regulated milk companies to each farmer for his milk, regardless of the use to which the company has put it.

In recognition of the fact that all companies can be expected to have either a higher or a lower fluid milk utilization rate than the market-wide average (which the blend price reflects) and thus will be obligated (under the established class prices) for either more or less money than the amount paid to their farmers as the uniform blend price, the order established a clearing house operation known as the producer settlement fund. Each company either pays into, or draws from, the fund the difference between the uniform blend price to its farmers and the value of its milk computed at the class prices. The operation of the fund has no effect upon the class prices.

Before the Upper Chesapeake Bay Milk Marketing Order could be placed into operation, the Act required the Secretary of Agriculture to obtain the agreement of the milk companies to be regulated thereby, 7 U.S.C. 608c(8), or, failing that agreement, the approval of "at least two-thirds of the producers * * * who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in

such marketing agreement, or order * * *." 7 U.S.C. 608c(9)(B)(i).

The milk companies declined to give their consent to the proposed order. The Secretary thereupon submitted the proposed marketing order for the farmers' approval by means of a referendum. The result was 1,663 votes in favor of the proposed Order and 192 against (R. 192).

Accordingly, on December 31, 1959, the Secretary officially promulgated the order as Milk Marketing Order No. 127 (later renumbered 16); 24 F.R. 11071, *et seq.* (R. 50–81). The Order became effective for reporting purposes on January 1, 1960, and for purposes of minimum price payments on February 1, 1960.

3. THE INSTANT CASES.

Petitioners are the co-partners of the Mills Dairy Products Company,[1] which is engaged almost exclusively in the processing and sale of fluid milk in counties in Maryland located on the "Eastern Shore" of Chesapeake Bay (R. 211). All these counties are included within the Upper Chesapeake Bay Milk Marketing Area (R. 53). Mills Dairy is a fully regulated milk company ("handler") under the terms of Marketing Order No. 16 (R. 99).

From the Marketing Order's inception, petitioners refused to comply with its minimum price provisions, paying substantially less than the established Class I

[1] While two other milk companies have joined in the petition, neither is presently in business and the sole proprietor of Twilley's City Dairy is deceased. For this reason, reference is made only to the Mills petitioners.

price for the milk which they used for fluid purposes. Accordingly, pursuant to 7 U.S.C. 608a(6), the United States filed suit in the federal district court for Maryland to enforce petitioners' compliance with the Marketing Order (R. 81). On June 30, 1960, the district court granted the government's motion for summary judgment and ordered petitioners to comply with the Marketing Order (R. 96), and on September 2, 1960, denied Mills' motion for a stay, again directing compliance with the Marketing Order (R. 107). Despite these court orders, petitioners did not pay to the Market Administrator the amounts they owed to the producer settlement fund under Order No. 16.

Petitioners challenged the validity of the Milk Marketing Order in an administrative review proceeding before the Secretary of Agriculture pursuant to 7 U.S.C. 608c(15)(A). In that proceeding, petitioners sought to introduce additional evidence and to try *de novo* the question of whether the Secretary's inclusion of the "Eastern Shore" counties within the marketing area was warranted. The hearing examiner declined to admit this new evidence. Petitioners were permitted to take an interlocutory appeal from the examiner's ruling to the Secretary, who upheld the hearing examiner's decision. (App., *infra*, pp. 21–36.) The Secretary noted that (App., *infra*, p. 30), "section 8c(4) of the act (7 U.S.C. 608c(4)) requires that in issuing [a marketing] order the Secretary shall find *upon the evidence introduced at the promulgation hearing*, that the issuance of the order 'and all the terms and conditions thereof' will tend to effectuate the declared policy of the

act." Accordingly, he ruled that "No new evidence, that is evidence other than the record evidence bearing upon the validity of the issuance of the order, would be received in such a case" (App., *infra*, p. 30). From the final decision of the Secretary rejecting their challenge (R. 118–149), petitioners sought judicial review in the district court as provided in 7 U.S.C. 608c(15)(B).

On June 13, 1962, the district court rendered an opinion, *sub nom. Willow Farms Dairy, Inc.* v. *Freeman*, 206 F. Supp. 239 (R. 205), and on June 26, 1962, entered its final judgment (R. 240) which held Milk Marketing Order No. 16 invalid. The court also entered an order dissolving its prior injunction and released petitioners from the minimum price requirements of the Marketing Order, which it had ordered paid to the producer settlement fund in the prior enforcement action (R. 243). While the district court rested its decision on several grounds, the only one urged by petitioners here is its holding that the Marketing Order was discriminatory because it included within the same marketing area both the City of Baltimore and surrounding Maryland counties, among others those on the "Eastern Shore" of Chesapeake Bay. The other grounds here asserted by petitioner (relating to the rejection of new evidence and the findings of the Secretary) were summarily rejected by the district court (R. 235).*

On March 11, 1963, the court of appeals reversed the judgment of the district court. The appellate court

* See also, Point 4 of the opinion of the district court rejecting Mills' earlier application for stay of enforcement, 187 F. Supp. 314, 319 (R. 114–115).

considered in detail, and rejected, each of the grounds asserted by the petitioners as a basis for holding the Marketing Order invalid. It also rejected petitioners' claim that they were entitled to a *de novo* hearing before the Secretary on the validity of the Marketing Order. The court of appeals observed that, under 7 U.S.C. 608c(15)(A) (Pet. App. 14a):

> Relief [from a marketing order] may be asked solely on the ground that the Order "is not in accordance with law." Obviously, such a review is based upon the record made and concluded in promulgation of the Order. No additional proof is permissible; the Order must stand or fall upon the proof and findings there. [Citing cases.] To allow evidence would be to reopen, rather than to judge, the promulgation proceeding.

It concluded that the Secretary had fully complied with the statutory requirements and ordered the Marketing Order enforced (Pet. App. 19a).

On April 26, 1963, the court of appeals denied the petitioners' motion for a stay of its mandate for reasons stated in its opinion on that motion (Pet. App. 23a). Notwithstanding the denial of a stay, judicial sanctions were necessary to obtain petitioners' compliance with the Marketing Order.

ARGUMENT

This Court has previously held the Agricultural Marketing Agreement Act of 1937 to be constitutional and has approved, as authorized by that Act, milk marketing orders corresponding in all essentials to the one here questioned. *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, and *H. P. Hood & Sons* v.

United States, 307 U.S. 588. The court below determined that the marketing order under challenge was supported by substantial evidence in the administrative record and that its issuance complied with all statutory requirements. The decision is plainly correct. Thus, while these petitioners endeavor to raise issues different from those presented in the unsuccessful petition of another milk company from the same decision (see *supra*, p. 3), there remains no occasion for review by this Court.

1. Before the Secretary of Agriculture may promulgate an order establishing a milk marketing area, Section 8c(3) of the Act [9] requires him to give notice and opportunity for hearing on the proposed order. In this case, on January 14, 1959, the Secretary gave public notice of a proposal to establish a marketing area covering the region centered around Baltimore. 24 F.R. 428. In the notice, the terms of the proposed order were set forth in full. They expressly indicated that the proposed marketing area would extend to Maryland counties on the "Eastern Shore" as well as those on the western or Baltimore side of Chesapeake Bay. 24 F.R. 429.[10]

Pursuant to the notice, during February and March of 1959, the Secretary held public hearings in Baltimore on the proposed marketing order (R. 1). Petitioners were represented at those hearings, with the

[9] 7 U.S.C. 608c(3).

[10] Section 1027.6 of the proposed order listed by name, as under consideration for inclusion in the marketing area, the counties of Cecil, Queen Annes, Kent, Caroline, Talbot, Dorchester, Wicomico, Somerset and Worcester, which together comprise the "Eastern Shore" of Maryland.

full right to submit evidence and to make their views known on the proposal. In due course the Secretary handed down his decision on the proposed order (R. 1–49), based "[u]pon the evidence adduced at the hearing" (R. 2). Among other matters, the Secretary decided that the establishment of the proposed marketing area, including the "Eastern Shore" counties, was warranted.

The petitioners, who conduct their milk business exclusively on the Eastern Shore, objected to having that area included in the marketing order. They petitioned the Secretary for relief as provided under Section 8c(15)(A) of the Act,[12] alleging in substance that the inclusion of the Eastern Shore was not in accordance with law. The Secretary ruled that this question must be decided on the basis of the evidence presented at the promulgation hearing upon which the marketing order was based. Accordingly, he excluded petitioner's additional evidence, offered in an attempt to litigate the matter *de novo*.

This rejection of their offer of additional evidence, petitioners contend, denied them due process of law and violated the Agricultural Marketing Agreement Act, the Secretary's own regulations and the Administrative Procedure Act. These claims, as both the district court (R. 235) and the court of appeals (Pet. App. 14a) held, are without substance.

That the Constitution does not require a trial *de novo* was made clear in *Inland Empire Council* v. *Millis*, 325 U.S. 697. The Court there observed that (325 U.S. at 710) "[t]he requirements imposed by

[12] 7 U.S.C. 608c(15)(A).

that guaranty [of due process] are not technical, nor is any particular form of procedure necessary." The Court went on to reaffirm its holding in *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 152–153, that the "demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." That requirement was fully met in this case.

Nor does the Act require a trial *de novo* in a review proceeding under Section 8c(15)(A).[13] In Section 8c(4) of the Act[14] Congress specifically provided that the "terms and conditions of a marketing order must be based "upon the evidence introduced at such [promulgation] hearing." It is thus clear that the Secretary's marketing order must stand or fall on the basis of the record there established. In other words, as both courts below held, the Secretary properly looked only to the promulgation record when petitioners challenged the validity of the marketing order as "not in accordance with law."

Nothing in Section 8c(15)(A) is to the contrary. The term "hearing", as used in that section does not

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[13] 7 U.S.C. 608c(15)(A).

[14] 7 U.S.C. 608c(4).

[15] 7 U.S.C. 608c(15)(A) provides:

"Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Sec-

require a trial-type, evidentiary procedure in all cases, as petitioners suggest (Pet. 9–11).[9] The meaning to be given that word depends on the context of its use. As the Court observed in *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 317, "[t]he answer will not be found in definitions of hearing lifted from their setting and then applied to new conditions. The answer will be found in a consideration of the ends to be achieved in the particular conditions that were expected or foreseen." Here, where the Act requires a marketing order to be based on a given record, the Secretary properly conducted an appellate type of hearing on the question of whether the evidence in the record, considered as a whole, indeed supported the marketing order. As the court of appeals stated (Pet. App. 14a), "[t]o allow evidence would be to reopen rather than to judge, the promulgation proceeding." Accord, *Beatrice Creamery Co. v. Anderson*, 75 F. Supp. 363, 367 (D. Kan.); *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 217 (E.D. Mo.), affirmed, 155 F.2d 87 (C.A. 8); *Sprague Dairy Co. v. Anderson*, 6 A.D. 729 (N.D. Ill.).[10]

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retary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law."

[10] See also, Davis, *Administrative Law Treatise* (1958 Ed.), § 7.01.

[11] *New York State Guernsey Breeders' Coop. v. Wickard*, 141 F. 2d 805 (C.A. 2, 1944), cited by petitioners (Pet. 10), is not a contrary holding. The question here presented was not raised or discussed by the court in that case. The Secretary has regularly ruled in later cases that the validity of a marketing order may be challenged only on the basis of the record made in the promulgation hearing. See the Secretary's decision on the evidence in this case, citing many such rulings, App., *infra*, pp. 34–35.

Nor did the hearing examiner's refusal to admit new evidence and conduct a trial *de novo* violate the Secretary's own regulations. Since additional evidence may not be considered in a proceeding to review the validity of a marketing order, under the Secretary's Rules of Practice the examiner properly excluded the new evidence as irrelevant and immaterial. 7 C.F.R. § 900.60(d) (Pet. App. 51a–54a).

Petitioners' reliance upon provisions in the Secretary's Rules of Practice relating to the admission of evidence is misplaced. Like the Federal Rules of Civil Procedure governing the district courts, the Secretary's Rules are a general guide to practice and procedure. Whether a given rule comes into play, of course, depends entirely on the nature of the case. In the circumstances here presented, no *de novo* evidence was appropriate. Cf. Rule 56, Fed. R. Civ. P. See, also, *United States* v. *Bianchi*, No. 529, October Term, 1962, decided June 3, 1963.

Finally, the Administrative Procedure Act affords petitioners no support. In the Agricultural Marketing Agreement Act Congress specifically provided that marketing orders were to be based on evidence submitted to the Secretary at a public hearing held before the promulgation of the proposed order. 7 U.S.C. 608c (3), (4). Petitioners evidently withheld some of the matters which they should have presented there. The Administrative Procedure Act does not entitle them to ignore specific procedures established by Congress. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492.

2. Petitioners' object to the geographical bounds of the marketing area as drawn by the Secretary. In essence, they urge that there are two distinct milk markets, Baltimore City and the counties on the western side of Chesapeake Bay and the "Eastern Shore." Only the Baltimore side of the bay, they claim, had a milk surplus, and the Secretary therefore could not extend regulation to the Eastern Shore.

This argument goes only to the sufficiency of the evidence in the record to support the Secretary's decision on the proper configuration of the market, as this Court has already found nothing *per se* improper in the inclusion of urban and rural communities in one milk marketing area. *United States* v. *Rock Royal Co-op.*, 307 U.S. 533.[5] As the court of appeals found (Pet. App. 11a–14a), there was substantial evidence to support the Secretary's conclusion that the milk surplus problem, extant or incipient, threatened the stability of milk marketing in the entire area included in his marketing order. For the administrative record reflected, and the Secretary found, *inter alia*: (1) that the milk companies with plants in Baltimore City sell more fluid milk on the "Eastern Shore" than do companies in petitioners' position (R. 8-12, 134–40); (2) that the milk companies located in Baltimore compete with companies on the "Eastern Shore" for dairy farmers to supply them (R. 6-7); (3) that the prices paid by "Eastern Shore" companies for their milk were directly related to the

[5] In *Rock Royal* the milk market area there approved consisted of New York City and the then rural or suburban counties of Westchester, Nassau and Suffolk in New York State.

prices paid by the Baltimore City companies (R. 4–5, 142); and (4) that 86 farmers on the Eastern Shore market their milk with "Baltimore" companies (R. 137), almost three times the number who sell to Mills Dairy (Brief for Mills Dairy in the court of appeals, p. 39).

Petitioners' reliance upon the existence of a municipal ordinance, purporting to bar petitioners from selling milk in Baltimore City, is misplaced. As the court of appeals noted, "it does not appear that [petitioners] ever tried to enter Baltimore or, indeed, wished to do so." (Pet. App. 12a). Moreover, the ordinance is of doubtful validity. The municipal ordinance involved is of the type which bars from sale within the city limits milk or milk products not bottled at a plant located inside the corporate bounds of the city.[*] In *Dean Milk Co.* v. *Madison*, 340 U.S. 349, this court struck down such a municipal milk ordinance as unconstitutional. Furthermore, a Maryland court has already held the very Baltimore ordinance in question to be invalid insofar as it applies to sales of ice cream within the city limits. *Sapplee-Willis-Jones Milk Co.* v. *Huntington Williams* (Baltimore City Circuit Court, decided July 9, 1956). It is not the force of the municipal ordinance but business competition which has kept petitioners from selling in Baltimore.

[*] Art. 12, Sec. 15, Baltimore City Code (1950) provides in pertinent part:

"No permit to pasteurize milk, cream, ice cream or other dairy products for sale in Baltimore City shall be granted to any person, firm or corporation whose plant shall be located beyond the corporate limits of Baltimore City."

Petitioners' final attack on the configuration of the marketing area is in effect a challenge to the producer settlement fund. Petitioners complain that they are compelled to pay into that fund, and thus to "contribute financially to the solution of the Baltimore City marketing problem." (Pet. 17). This, in substance, is the often repeated argument that those companies which pay into the fund subsidize those companies that withdraw from it. This Court considered and rejected identical contentions in *United States* v. *Rock Royal Co-op., supra*, and *H. P. Hood & Sons* v. *United States*, 307 U.S. 588. The Court there pointed out that the milk companies have no financial interest at all in the producer settlement fund, 307 U.S. at 561, and held that equalization pools are properly authorized by the Act. See 307 U.S. at 571-73. The court of appeals so held here.

3. Petitioners' final complaint is directed at the findings of the Secretary, as they were expressed in the milk marketing order itself. Specifically, petitioners' objection is that the order "contains no findings to support [the Secretary's] ultimate conclusion but merely paraphrases the Act" (Pet. 22). Petitioners overlook the fact that, in addition to the formal findings set out in the marketing order, the Secretary also issued a decision in which he made additional findings (R. 1-49) and explained his reasons for promulgating that order. As the court of appeals noted (Pet. App. 8a), the Secretary's decision discussed "at considerable length" the questions of the need for milk marketing regulation in the upper Chesapeake Bay area. He explained in detail

the various factors which he considered in reaching his conclusion that regulation was necessary (R. 4–40). The court of appeals concluded that the Secretary's findings have "firm basis in the record" (Pet. App. 8a). Under these circumstances, petitioners have failed to demonstrate any cause for further review of the decision below.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1963.

APPENDIX

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket No. 127–1

IN RE MILLS DAIRY PRODUCTS COMPANY, *ET AL.*,
PETITIONERS

Interlocutory Rulings on Admissibility of Evidence

[19 A.D. 807]

I

This is a proceeding under Section 8c(15)(A) of the Agricultural Adjustment Act (1933), as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 and subsequent amendments (7 U.S.C. 601 *et seq.*). Section 8c(15)(A) of the act (7 U.S.C. 608c(15)(A)) provides:

> Any *handler* subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith *is not in accordance with law* and praying for a modification thereof or to be exempted therefrom. * * *. [Emphasis supplied.]

This document is caused to issue because petitioners have requested review of rulings of the hearing examiner holding inadmissible certain testimony offered by petitioners at the hearing in the proceeding.

II

The petitioners are five handlers of milk subject to Order No. 127 issued under the act. The order regulates the handling of milk in the "Upper Chesapeake Bay" marketing area which includes the counties on the Eastern Shore of Maryland in addition to the counties of Baltimore, Anne Arundel, Harford, Howard, the city of Baltimore and the town of Laurel, Maryland. The petitioners distribute milk in some of these counties on the Eastern Shore of Maryland and attack the inclusion of the counties in the marketing area defined under the order. They also raise other objections to the issuance of the order generally.

The protested order was issued December 28, 1959 (24 F.R. 11071, after the usual notice, public hearing, briefs, recommended decision (24 F.R. 7530), exceptions to the recommended decision, final decision including findings and conclusions and producer referendum. Among the numerous issues for decision following the public hearing was the matter of including the Eastern Shore counties in the marketing area covered by the order and this was the subject of specific findings and conclusions in the final decision.

III

On December 31, 1959, petitioners, who are some of the handlers on the Eastern Shore subject to the order, filed a petition under section 8c(15)(A) of the act. The petition alleged that the order was a nullity because the Secretary did not make findings of fact as to prices which the petition claimed are a "threshold jurisdictional statutory requisite." The petition also alleged irreparable injury to petitioners in the way of interference with their freedom to contract for milk, submission to reporting and auditing requirements, etc. An application for interim relief filed by

petitioners January 11, 1960, was denied January 26, 1960. On January 27, 1960, respondent filed an answer to the petition. On January 29, 1960, Hearing Examiner Clarence H. Girard, to whom the case had been assigned, granted a motion by Brice G. Twilley to become a party petitioner in the proceeding, and scheduled hearing upon the petition and answer for February 24, 1960, in Baltimore, Maryland.

On February 4, 1960, petitioners filed an amended petition. The body of the petition comprises 24 legal-size pages. Because of the filing of the amended petition and the necessity for an answer, the hearing examiner cancelled the scheduled hearing. On February 19, 1960, respondent filed an application to dismiss designated portions of the amended petition. Upon request of petitioners, they were given an extension of time to March 24, 1960, for the filing of an answer to the application to dismiss which would otherwise be due March 14, 1960. On March 24, 1960, petitioners filed their answer to respondent's application to dismiss and requested oral argument thereon. Pursuant to this request, oral argument was held before the Judicial Officer on April 11, 1960, in Washington, D.C.

At the oral argument upon the application to dismiss and the answer thereto, petitioners withdrew several paragraphs of the amended petition. The application to dismiss was denied by the Judicial Officer on April 13, 1960. In the ruling issued, the Judicial Officer discussed the complaints of the respondent that the amended petition was vague, ambiguous, prolix, argumentative and therefore impossible to answer appropriately and also respondent's objection that the amended petition referred to evidence outside the record upon which the order was promulgated. The Judicial Officer ruled that in the interests of expedition the proceeding should continue on the basis of

the amended petition although it contained a good deal of argument since most if not all of the materials in the petition seemed to deal with the issue of whether the issuance of the protested order was supported by the evidence in the promulgation record, a cause of action cognizable in an 8c(15)(A) proceeding under the act. He stated also that while this is a *review* proceeding and not a *de novo* proceeding that questions as to the admissibility of evidence other than the promulgation record could be handled as they might arise in later stages of the proceeding.

Respondent filed an answer to the amended petition April 27, 1960. On May 4, 1960, Hearing Examiner Girard set the proceeding for hearing June 7, 1960, in Baltimore, Maryland. On June 2, 1960, petitioners requested a postponement of the hearing to June 28, 1960, which was granted by the hearing examiner. On June 30, 1960, petitioners asked for a further postponement of the hearing to a later date which was also granted by the hearing examiner. On July 5, 1960, the hearing examiner set the case for hearing August 3, 1960, in Baltimore. On July 26, 1960, petitioners filed a motion to change the place of hearing to Cambridge, Maryland, (1) for the convenience of petitioners and (2) because petitioners planned to call about 50 witnesses many of whom might be unable to travel to Baltimore. Respondent opposed the change upon the general ground that 50 "disinterested witnesses" engaged in farming, industry, etc., upon the Eastern Shore would not have testimony relevant to the issues in the proceeding. The hearing examiner granted the motion upon the stated ground of convenience to the petitioners and pointed out that since this is a *review* proceeding there were problems to be considered as to whether the number of witnesses referred to in petitioners' motion were going to

be offered to retry *de novo* the question as to whether the Eastern Shore counties should be included in the marketing area regulated by the order. He stated that these problems would be gone into with counsel at the start of the hearing.

IV.

The hearing commenced as scheduled on August 3, 1960, in Cambridge, Maryland. Pursuant to the hearing examiner's announcement in his order granting removal of the hearing to Cambridge, Maryland, the first order of business was discussion and argument as to whether new evidence, that is evidence outside the record upon which the order was issued, was relevant and material and therefore admissible in this proceeding. Petitioners also were granted permission to amend their complaint to charge violation of the Federal Reports Act of 1942 (5 U.S.C. §139) in the promulgation of the order.

Petitioners put in as witnesses four of the petitioners; seven milk producers who deliver milk to petitioner Mills Dairy Products Company of Cambridge, Maryland; two producers who deliver to petitioner Lewes Dairy of Lewes, Delaware; a newspaper editor and historian, Max Chambers; Rev. Edwin Horney, an ordained minister; and an economist and statistician with legal training, Max Malin.

In connection with all the testimony for petitioners except that of Chambers and Malin, the hearing examiner allowed petitioners, when he ruled out testimony, to make an offer of proof in the form of questions and answers. In the case of Chambers, who apparently planned to testify at considerable length about the isolation or "segregation" of the Eastern Shore of Maryland from the city of Baltimore and its

environs historically, culturally, economically, industrially, politically and otherwise, the hearing examiner required a statement as an offer of proof. In the case of Malin, it was also apparent to the hearing examiner that the witness would spend a great deal of time proffering his evaluations of the evidence in the promulgation record by means of questions and answers, and the hearing examiner ruled that offer of proof of the excluded testimony should be made by means of a brief statement. Rather than do this, petitioners requested the hearing examiner to certify his rulings concerning admissibility to the Judicial Officer for review at that stage. The hearing examiner denied the request on the authority of the rules of practice and prior decisions of the Judicial Officer under similar rules of practice for proceedings under other acts administered by the Department. Petitioners then sought and obtained on August 4, 1960, a recess of the hearing to seek an interlocutory review of the rulings before they continued with the proceeding. On August 17, 1960, petitioners requested such a review.

V

The hearing examiner was clearly correct in refusing to certify *at this stage* an appeal from his rulings excluding offered testimony. Section 900.55(c)(7) of the applicable rules of practice authorizes the presiding officer at the hearing to admit "or exclude" evidence; section 900.59 authorizes the presiding officer to rule upon all motions and requests made prior to the transmittal of the record to the Secretary by the hearing clerk for final decision in the proceeding; section 900.59(b) vests discretion in the presiding officer as to whether he shall certify any motion, request, etc., to the Secretary for decision prior to the transmittal of the record to the Secretary for final

decision in the proceeding; and section 900.60(d)(8) provides for the incorporation of offers of proof in the transcript when a presiding officer excludes evidence proffered for later review and reopening of the hearing if it is decided later by the Judicial Officer or the courts that the evidence covered by the offer should have been admitted. As we have said about similar departmental rules of practice, the rules provide that a presiding officer may either rule upon the admissibility of evidence or certify the question to the Secretary. If he does rule, the appeal must wait until after the hearing is concluded and the hearing officer files his report. See *In re Caggill*, 12 A.D. 1109 (1953). Otherwise, interlocutory appeals from hearing examiner's rulings during the course of hearings would flood the deciding officer.

VI

But in this case perhaps we should make an exception. Counsel for petitioners insist that they are being deprived of the "full and fair hearing" guaranteed by the Constitution of the United States and by section 8c(15)(A) of the act by the refusal of the hearing examiner to regard as relevant and material in the proceeding the evidence excluded. Consequently, although we should not do so as a general rule, we shall proceed to review the hearing examiner's rulings now as an interlocutory matter so that the proceeding may continue expeditiously.

As we stated at the outset, section 8c(15)(A) of the act provides for the filing of a petition by a *handler* stating that an order, a provision thereof or an obligation imposed in connection therewith is "not in accordance with law." The petitions involved are petitions filed pursuant to this provision of the act. As described above the original petition alleges

that certain jurisdictional findings were not made in connection with the issuance of the order. The amended petition recites under heading I the identity of the petitioners and under heading II that the original petition is incorporated by reference. Heading III constitutes the rest of the amended petition except the prayers for relief and consists of allegations in paragraphs numbered 1 through 51 inclusive together with unnumbered paragraphs appearing between numbered paragraphs. The lead sentence or the concluding sentence in practically all paragraphs alleges some deficiency in the promulgation record evidence to sustain the issuance of the order as a whole or the provisions of the order including the Eastern Shore of Maryland. Paragraph 1 states that the order is invalid because "it is not based on an integrated record consisting of probative evidence on all relevant factors in that * * *" and then follow allegations as to the insufficiency of the evidence: paragraph 2 complains of the absence of a finding that marketing conditions in the designated marketing area *were not found to be unstable* and the *absence of any record evidence* upon which such a finding could be made; paragraphs 3, 4 and 5 likewise attack a finding *as unsupported by the evidence in the promulgation record;* paragraph 6 attacks a statement in the promulgation decision concerning the spread between a cooperative's Class I price and blend price in 1955; paragraph 7 attempts to defeat certain statements *in the promulgation decision* by reference to *evidence in the promulgation record* and concludes by alleging that *the record* fails to sustain the need for an order; paragraph 8 concludes by claiming that the provisions of the order resting upon market instability *are not supported by the record;* paragraph 9 commences by saying that *the evidence of record* does

not support the inclusion of the Eastern Shore; paragraphs 10, 12 and 14 begin by contending that inclusion of the Eastern Shore *is not supported by the evidence in the record or is contrary to the evidence;* paragraphs 11 and 15 call such inclusion "unrealistic," "arbitrary" or "capricious;" paragraph 18 asserts that such inclusion defeats the purposes of the underlying statute because of the existence of the city of Baltimore's restrictive health regulations the effects of which were *not adequately considered in the promulgation of the order* and consequently *the record was legally deficient;* paragraphs 19 through 27 deal with the city of Baltimore's regulation or practice of not permitting distribution in Baltimore of milk processed and packaged on the Eastern Shore and the alleged ensuing inequities, invalidities, etc., and the petition complains that these facts "concerning which the record is voluminous" were ignored in the issuance of the order.

Continuing through the amended petition we find that paragraphs 29 through 34 recite the evils of undue restraints upon the marketing of milk through the pretext of health regulations and accuse the Assistant Secretary of failing to deal with this subject in a serious way "despite the record he had available;" paragraph 35 states that the order is fatally defective in that it fails to *reflect the uncontroverted evidence* that Eastern Shore milk producers will be disadvantaged by having to equalize with other producers for the marketing area; paragraph 36 urges the unconstitutional interference with interstate commerce in milk by State agencies and says that the order thereby is fatally defective; the remaining paragraphs are scattered allegations as to inadequacy from an economic standpoint of either the promulgation evidence or the findings and conclusions made in the promulgation decision.

It is seen from the foregoing examination of the amended petition that the petitioners are attacking the quasi-legislative or rule-making act of the Assistant Secretary in making the decision to promulgate Order No. 127. It is seen also that what they claim is "not in accordance with law" about the promulgation of the order concerns the evidence upon which the order was issued and the findings and conclusions in connection therewith. Consequently it seems to me that the petitioners themselves by their petition have fixed the outer boundaries of the scope of this proceeding because they are claiming *legal* errors in the promulgation of the order just as if their appeal were direct to an appellate court. No new evidence, that is evidence other than the record evidence bearing upon the validity of the issuance of the order, would be received in such case.

Moreover, section 8c(4) of the act (7 U.S.C. 608c-(4)) requires that in issuing an order the Secretary shall find *upon the evidence introduced at the promulgation* hearing, that the issuance of the order "and all the terms and conditions thereof" will tend to effectuate the declared policy of the act. Again, because the issuance of an order is formal rule-making under the Administrative Procedure Act, section 7 of that act (5 U.S.C. 1006(c)) provides that no rule shall be issued except "as supported by and in accordance with the reliable, probative, and substantial evidence."

VII

Generally the proffered testimony of petitioners and their producers ruled inadmissible consists of such items as the handler's financial structure, statements that the producers would not be satisfied with a lower price from petitioners than they have been

getting which would allegedly be the case if the petitioners have to pay part of their costs for milk into the marketwide pool under the order, and that the producers delivering to petitioners would then sell their milk in the Philadelphia market rather than the Baltimore market, except that in the case of petitioner Ott the offer of proof was to the effect that if Ott was not available to take his producers' milk they would have to sell their milk as Class II to a condensery. There is no explanation in the latter instance as to why Ott would not take the milk or why Ott's producers should prefer to sell their milk at the Class II price to a condensery instead of to Ott at a higher price, the uniform price under the order. Generally, the offers of proof as to the petitioners included some vague statements that they would have difficulty staying in business or "probably" would have to go out of business.

It is to be expected that handlers becoming subject to a Federal milk marketing order with a marketwide pool who have a utilization of milk higher than the marketwide average will not like to pay part of their costs for milk to the marketwide pool instead of paying only their own producers. It is natural too for their producers not to look upon such a plan favorably. But this is an inevitable result of the equalization authorized by the act; many handlers and producers have had to operate under the plan over the years and its constitutionality was upheld a long time ago in *United States* v. *Rock Royal Cooperative, Inc.*, 307 U.S. 533 (1939); and *H. P. Hood & Sons* v. *United States*, 307 U.S. 588 (1939).

I find no cause of action stated in the amended petition for which the evidence from petitioners and their producers that was excluded is relevant and ma-

terial. Too, as we have said above the challenge here is to the validity as a matter of law of the inclusion of the Eastern Shore counties in the marketing area and in this proceeding only *handlers* have standing to sue.

The excluded testimony of Horney and Chambers was offered apparently for the purpose of showing that the Eastern Shore of Maryland is segregated from, or is not "homogeneous" with, the Baltimore City area from the historical, ethnic, sociological, economic and industrial aspects. The excluded testimony does not deal with the production or marketing of milk. How such evidence has any relevant or material bearing upon the issues made by the amended petition escapes me. Besides, the testimony relates only to the lack of contribution by the Eastern Shore to the economy and culture of the Western Shore and says nothing about the traffic in the other direction. The kind of evidence offered is just as irrelevant as the question as to how much of that liquid (not milk) flows from the Western Shore to the Eastern Shore that baseball fans in the Washington, D.C., area are constantly told in song and story over television and radio comes from "the land of pleasant living" and is "brewed on the shores of the Chesapeake Bay."

I agree with the hearing examiner that the excluded testimony of Horney and Chambers is irrelevant and immaterial although I must concede that Chambers' depiction of the provincial, colonial and political history of the Eastern Shore is colorful.

The attempted testimony of Max Malin is a little different apparently. Counsel for petitioners seek to have Malin testify as an expert to the effect that the evidence in the promulgation record is inadequate, insufficient, etc., to warrant the findings and conclusions made in the final decision as to the issu-

ance of the order as a whole and as to the inclusion of the Eastern Shore in the regulated marketing area. The plan is to have counsel read each statement to this effect in the petition and to have Malin testify (under oath) that such statement is correct.

It seems to me that whether or not the promulgation record sustains the protested order is a matter of *law* and not of *opinion testimony*, either on behalf of the petitioners or of the respondent. These issues are the kind typically before the courts in appeals from decisions or orders made by administrative agencies upon a hearing record and I am not aware that any court has taken opinion testimony from experts as to the worth or probative value of the evidence in the administrative record rather than argument. The standard for adjudication under the act and in the light of the grievances listed in the petition here is whether the issuance of the order either as a whole or as it applies to the Eastern Shore is *in accordance with law*, the same criterion applicable in review by the courts of administrative action.

The limited scope of this proceeding for petitioners' grievances in their petition as ruled by the hearing examiner and by me herein is viewed by petitioners' counsel with horror as novel, revolutionary, unconstitutional, etc. As long as this is an *administrative* proceeding, they say, and the matter is still before the Secretary of Agriculture, they should have a full, evidentiary "hearing", because the word "hearing" in section 8e(15)(A) of the Act means a hearing for the taking of testimony. Aside from the fact that the petitioners in their petitions fixed the scope of the hearing as limited to examination of the promulgation record, it is well established that a "hearing," even an administrative "hearing," may mean in some cases only a "hearing" upon the applicable law. See *e.g.*,

Denver Union Stock Yard Co. v. *Producers Livestock Marketing Association*, 356 U.S. 282 (1958).

The mere fact that a handler files a petition does not automatically entitle him to an oral hearing devoted to adducing evidence immaterial and irrelevant to the issues in the proceeding. See, *e.g.*, *Crystal Lake Dairy Co.* v. *Brannan*, N.D. Illinois, Feb. 20, 1951, affirming *In re Crystal Lake Dairy Co.*, 8 A.D. 1 (1949). There is nothing new about this principle being applicable to 8c(15)(A) proceedings where handlers claim the promulgation record is inadequate or where they seek to try *de novo* such questions as the desirability or necessity for an order or amendment, whether there is instability in the market, whether the order tends to effectuate the policy of the act, etc. See *e.g.*, *Dairymen's League Cooperative Ass'n* v. *Brannan*, 173 F. 2d 57 (2d Cir. 1949), affirming *In re Dairymen's League Cooperative Ass'n.*, 5 A.D. 143 (1946) (exhibit excluded seeking to show price for cream sold in certain areas should be Class III instead of Class II-A as prescribed by order); *Heinemann Creameries, Inc.* v. *Benson*, E.D. Wisconsin, October 30, 1953, 13 A.D. 1242, affirming *In re Kewaskum Dairy Company*, 12 A.D. 1 (1953) (necessity for order); *Sprague Dairy Company* v. *Anderson*, N.D. Illinois, Nov. 14, 1946, 6 A.D. 729, affirming *In re Clearleaf Dairy Co.*, 4 A.D. 627 (1945) (inclusion of Will County, Illinois, in the marketing area of the Suburban Chicago milk order); *In re Charles P. Mosier, Jr.*, 16 A.D. 1209 (1957) (whether order amendment tended to effectuate declared policy of act); *In re Beatrice Foods Co.*, 15 A.D. 767 (1956), affirmed, N.D. Oklahoma, Feb. 25, 1957, 16 A.D. 177 (whether order amendment was necessary or tended to effectuate declared policy of the act); *In re Clover Leaf Dairy Co.*, 15 A.D. 339 (1956) (desirability of

order amendment); *In re Roberts Dairy Company*, 4 A.D. 84 (1945) (desirability of pricing formula in order); *In re William S. Wright*, 2 A.D. 327 (1943) (whether order regulating handling of oranges tended to effectuate declared policy of the act).

Petitioners' counsel contend that they have to make "a record" upon which to seek judicial review under section 8c(15)(B) and that therefore the proffered testimony should be received in evidence.[1] But the evidentiary facts are in the record, the promulgation record incorporated herein which petitioners assert in their petition does not support the contested order.

It might be asked why not take the evidence anyway for "what it is worth" or for the sake of good public relations. But the evidence is irrelevant and immaterial and both by law and by requests of the Judicial Conference of the United States administrative agencies are supposed to keep irrelevant and immaterial matter out of hearing records to be reviewed by the courts. Too, I do not consider it good public relations to admit evidence on the assumption that it is relevant and material when the hearing examiner and the agency know such is not the case and ignore the evidence in deciding the case.

The kind of evidence petitioners seek to have admitted is of course pertinent to a hearing looking to the promulgation of an order or to amendment. Petitioners are free to petition for an amendment of the order. At such a hearing all interested parties such as producers and handlers of milk from the Western Shore disposed of on the Eastern Shore may have their say in testimony also, as well as Eastern Shore handlers not involved in this proceeding and Eastern Shore producers who do not deliver to the petitioning

[1] Section 7 of the Administrative Procedure Act, 5 U.S.C. § 1006(c).

handlers here, none of whom can be parties to this quasi-judicial proceeding concerned with alleged *illegality* of the order.

In view of the foregoing, the hearing examiner's protested rulings are now upheld. But this is an interlocutory appeal and petitioners may renew their objections in filing exceptions, if they do so, to the hearing examiner's report and they may submit a statement as an offer of proof in connection with the proffered testimony of Malin.

Done at Washington, D.C., August 29, 1960.

THOMAS J. FLAVIN, *Judicial Officer.*

The Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.*, provides in pertinent part as follows:

7 U.S.C. 601

> It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

7 U.S.C. 602

> It is declared to be the policy of Congress—
>
> (1) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.
>
> * * * * * * *

7 U.S.C. 608a(6)

The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623 and 624 of this title, in any proceeding now pending or hereafter brought in said courts.

* * * * * *

7 U.S.C. 608c(1)

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

7 U.S.C. 608c(2)

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except products of naval stores and the products of honeybees), or to any regional or market classification, or any such commodity or product: Milk. * * *

7 U.S.C. 608c(3)

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order

will tend to effectuate the declared policy of sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

7 U.S.C. 608c(4)

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title with respect to such commodity.

7 U.S.C. 608c(5)

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payments to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval, or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk pur-

chased by him at the prices fixed in accordance with paragraph (A) of this section.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pur-

suant to paragraph (A) of this subsection for such milk.

* * * * *

7 U.S.C. 608c(7)

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)–(7) of this section and necessary to effectuate the other provisions of such order.

7 U.S.C. 608c(8)

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such orders have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided*, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

7 U.S.C. 608c(9)

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing

area specified therein tends to prevent the effectuation of the declared policy of sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers, who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

* * * * *

7 U.S.C. 608c(11)(B)

Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary

finds practicable, consistently with carrying out such declared policy.

7 U.S.C. 608c(12)

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

7 U.S.C. 608c(13)(A)

No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title shall be applicable to any producer in his capacity as a producer.

* * * * *

7 U.S.C. 608c(15)(A)

Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance

with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B). The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling; provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to the subsection shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection.

* * * * * *

7 U.S.C. 608c(18)

The Secretary of Agriculture prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain

the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

7 U.S.C. 608c(19)

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of sections 601–604, 607–608a, 608b, 608c, 608d, 608e–1 to 612, 613, 614–619, 620, 623 and 624 of this title, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or processors, or the total volume of production,

as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section.

* * * * *

7 U.S.C. 1301

(a) For the purposes of this subchapter and the declaration of policy—

(1) (A) The "parity price" for any agricultural commodity, as of any date, shall be determined by multiplying the adjusted base price of such commodity as of such date by the parity index as of such date.

(B) The "adjusted base price" of any agricultural commodity, as of any date, shall be (i) the average of the prices received by farmers for such commodity, at such times as the Secretary may select during each year of the ten-year period ending on the 31st of December last before such date, or during each marketing season beginning in such period if the Secretary determines use of a calendar year basis to be impractical, divided by (ii) the ratio of the general level of prices received by farmers for agricultural commodities during such period to the general level of prices received by farmers for agricultural commodities during the period January 1910 to December 1914, inclusive. As used in this subparagraph, the term "prices" shall include wartime subsidy payments made to producers under programs designed to maintain maximum prices established

under the Emergency Price Control Act of 1942.

(C) The "parity index," as of any date, shall be the ratio of (i) the general level of prices for articles and services that farmers buy, wages paid hired farm labor, interest on farm indebtedness secured by farm real estate, and taxes on farm real estate, for the calendar month ending last before such date to (ii) the general level of such prices, wages, rates, and taxes during the period January 1910 to December 1914, inclusive.

(D) The prices and indices provided for herein, and the data used in computing them, shall be determined by the Secretary, whose determination shall be final.

(E) Notwithstanding the provisions of subparagraph (A) of this paragraph, the transitional parity price for any agricultural commodity, computed as provided in this subparagraph, shall be used as the parity price for such commodity until such date after January 1, 1950, as such transitional parity price may be lower than the parity price, computed as provided in subparagraph (A) of this paragraph, for such commodity. The transitional parity price for any agricultural commodity as of any date shall be—

(i) its parity price determined in the manner used prior to the effective date of the Agricultural Act of 1948, less

(ii) 5 per centum of the parity price so determined multiplied by the number of full calendar years (not counting 1956 in the case of basic agricultural commodities) which, as of such date, have elapsed after January 1, 1949, in the case of non-basic agricultural commodities, and after January 1, 1955, in the case of the basic agricultural commodities.

(F) Notwithstanding the provisions of subparagraphs (A) and (E) of this subsection, if the parity price for any agricultural com-

modity, computed as provided in subparagraphs (A) and (E) of this subsection appears to be seriously out of line with the parity prices of other agricultural commodities, the Secretary may, and upon the request of a substantial number of interested producers shall, hold public hearings to determine the proper relationship between the parity price of such commodity and the parity prices of other agricultural commodities. Within sixty days after commencing such hearing the Secretary shall complete such hearing, proclaim his findings as to whether the facts require a revision of the method of computing the parity price of such commodity, and put into effect any revision so found to be required.

(G) Notwithstanding the foregoing provisions of this section, the parity price for any basic agricultural commodity, as of any date during the six-year period beginning January 1, 1950, shall not be less than its parity price computed in the manner used prior to October 31, 1949.

* * * * *

7 U.S.C. 1301(c)

The latest available statistics of the Federal Government shall be used by the Secretary in making the determinations required to be made by the Secretary under this chapter.

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